

1 UNITED STATES DISTRICT COURT  
2 EASTERN DISTRICT OF NEW YORK

3 - - - - - X  
JOSE BAUTA,

4 Plaintiff,

5 -against-

6  
7 GREYHOUND LINES, INC.,  
8 SABRINA ANDERSON, AKOS  
9 GUBICA, KAROLY GUBICA, AND  
CAV ENTERPRISE, LLC,

10 Defendants.  
11 - - - - - X

: 14-CV-03725(FB)(RER)

:  
: United States Courthouse  
: Brooklyn, New York

:  
: Monday, May 7, 2018  
: 9:00 a.m.

12 TRANSCRIPT OF CIVIL CAUSE FOR JURY TRIAL  
13 BEFORE THE HONORABLE RAMON E. REYES  
UNITED STATES MAGISTRATE JUDGE, AND A JURY

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## Proceedings

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1 (In open court.)

2 (JUDGE RAMON E. REYES enters the courtroom.)

3 (The following occurs outside the presence of the jury.)

4 THE COURT: Mr. McElfish, you had something you  
5 needed to raise?

6 MR. McELFISH: Yes, Your Honor, good morning.  
7 Thursday -- I'm bringing it up this morning because I believe  
8 I have an obligation to bring something like this to your  
9 attention as quickly as I can.

10 The cross-examination of John Smith took place on  
11 Thursday, but I did not have the transcript to be sure of what  
12 I was going to do until after Friday, so today. After there  
13 was a sidebar about Mr. Barmen's cross-examination of John  
14 Smith and other injuries on the bus responding to the same  
15 forces biomechanical forces of shearing and otherwise, you  
16 instructed him to get open the topic; that it would open the  
17 door, quote unquote. I have the pages and lines here.

18 After that, he proceeded to go into medical records  
19 of other passengers, persisted with Colonel Smith on what  
20 other injuries existed on the bus and did he review the  
21 records and why wasn't he prepared to discuss that today  
22 before the jury. After Thursday I called Mr. Ostroff who in  
23 Pennsylvania who represented 22 of those people. After  
24 hearing what I had to say about what went down, he immediately  
25 left depositions in Pittsburgh and made arrangements to come

1 here today and is here today, who has represented some of  
2 these folks. The application is to allow us to call at least  
3 one bus passenger who was either equal or behind Mr. Bauta who  
4 had much, much worse injuries to testify in rebuttal. Now,  
5 the reason why I'm bringing it up today is because I want to  
6 avoid it age-old trap of failing to call in direct, because I  
7 am notice of it now. I'm certainly happy to call at least  
8 Brandon Osborn, who was one of the plaintiffs, who flew over  
9 four or five seats in the back of the bus and had his jaw  
10 broken and his teeth knocked out, among other things.

11 I'm willing to call him before I rest my direct  
12 case. I'm also willing to call him as a rebuttal witness if  
13 the court allows. Mr. Ostroff is present. He won't be here  
14 for the trial, just for the out-of-the-presence portion to  
15 discuss it with you if you wish. Thank you.

16 MR. BARMEN: This is the first time hearing of it,  
17 Your Honor, but we did have a sidebar where Mr. McElfish  
18 indicated I opened the door. Your Honor stated that not only  
19 had I not, that it wasn't going to happen, it didn't happen.  
20 I would oppose any such motion for the reasons previously  
21 stated. This was addressed. I didn't go down that road.  
22 There was no door open. And, frankly, I tried the  
23 Pennsylvania case for Mr. Osborn. Mr. McElfish didn't.

24 Mr. Osborn did not have a broken jaw, but that's  
25 either here nor there. The fact is the door wasn't open and

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1 it's a baseless motion and should be denied.

2 THE COURT: Do you have the transcript?

3 MR. McELFISH: May I respond?

4 THE COURT: No. Do you have the transcript?

5 MR. McELFISH: Of who?

6 THE COURT: Catherine Smith.

7 MR. McELFISH: I have it electronically.

8 THE COURT: Can you tell me the pages?

9 MR. McELFISH: Yes, sir. The admonition to  
10 Mr. Barman occurred somewhere around 750.

11 MR. BARMEN: Your Honor, when it is okay, there's  
12 one more points on this. It's important that I would like to  
13 make.

14 MR. McELFISH: I would like to respond to this,  
15 first.

16 MR. BARMEN: Can I come up here and see what you're  
17 looking at?

18 MR. McELFISH: Of course.

19 THE COURT: 742 is where the sidebar starts.

20 MR. McELFISH: Correct. And if you go to page 743,  
21 the Court said, I'm going to grant the motion -- I'm sorry.

22 THE COURT: I do not know that I said that.

23 MR. McELFISH: It's right here.

24 THE COURT: Well, that is what the transcript says.

25 MR. McELFISH: The Court, I'm going to grant the

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1 motion because first of all it opens the door. Second of  
2 all, are there are so many different factors that can go into  
3 play, that are in play, with whether one person in the middle  
4 of the bus is injured as opposed to another, for instance.

5 And I asked for a curative instruction and I asked  
6 for the questions and answers to be stricken. And then -- and  
7 there's no problem with that part. The problem with that  
8 part. Let's just assume you didn't say it. It doesn't really  
9 matter honestly. We had the discussion. You were aware of  
10 the issue, of course. It doesn't matter what you said in  
11 response. What happens after that is he starts grilling, at  
12 page 756, he -- let me get there.

13 Beginning at line 6 or 7. So 756 is after 742. And  
14 then he gets into that, so if you would read that Your Honor.  
15 That's what I'm referring to about culling the medical records  
16 of other passengers and why aren't you prepared with that  
17 today and things of that nature, opens the door after he was  
18 warned.

19 MR. BARMEN: Where did I question him on him not  
20 being prepared to do that?

21 MR. McELFISH: When you said, we have to call the --

22 MR. BARMEN: No, he said. Where did I question him  
23 on it?

24 MR. McELFISH: Hold on a minute.

25 MR. BARMEN: No you are making misrepresentations of

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1 the transcript and I want to make sure that we're accurate.

2 MR. McELFISH: Hold on. No problem. You are asking  
3 him who and --

4 MR. BARMEN: In response to his --

5 MR. McELFISH: Who else are you familiar with on the  
6 bus that had a cervical or lumbar herniation. I thought in  
7 the Philadelphia case it came up that some of those people had  
8 cervical and lumbar injuries. Who? I'm not prepared to  
9 discuss that.

10 THE COURT: So you start at page 742 with the  
11 sidebar and you go through --

12 MR. McELFISH: And jump up to 745.

13 THE COURT: Where the sidebar concludes.

14 MR. McELFISH: Correct.

15 THE COURT: And then 756.

16 MR. McELFISH: Correct.

17 THE COURT: To what.

18 MR. McELFISH: Yes, on down to page 757, line 13.

19 MR. BARMEN: May I respond, Your Honor?

20 THE COURT: Hold on.

21 MR. BARMEN: First off, the motion Mr. McElfish  
22 reference up around 742, was not a separate motion. It was  
23 referring back to the motion in limine that had been filed,  
24 number one. And that is clear on -- bear with me, I'm getting  
25 there.

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1           Mr. McElfish starting reading below where that was  
2 being discussed as if there were some new motion being  
3 referenced which is simply not true. You indicated that there  
4 was not going to be a trial within a trial of the other people  
5 on the bus and we agreed. In any event, they want to bring in  
6 Brendon Osborn. There are a couple of things that are  
7 important to that and Mr. McElfish who was also counsel of  
8 record in Philadelphia and Mr. Ostroff who was lead counsel in  
9 the case are certainly aware, there was no allegation, number  
10 one, that Brandon Osborn had any type of back injury;  
11 certainly no disc herniation.

12           Mr. Osborn also is comparing apples to oranges  
13 because as they all well know, Mr. Ostroff (sic) was in the  
14 very back seat of the bus in the middle in the aisle; because  
15 in the back seat, Your Honor, it goes all the way across.  
16 There's not just two on either side. There's a bench that  
17 goes all the way across. He testified very clearly that he  
18 was sitting in the middle of that bench. So when the accident  
19 happened, he flew forward in the aisle. He didn't have a seat  
20 in front of him like Mr. Bauta did.

21           So they want to bring him in to say that forces on  
22 him in the back of the bus were the same or greater than those  
23 on Mr. Bauta when Mr. Bauta didn't have the same situation  
24 that -- I'm sorry, Mr. Osborn did not have the same situation  
25 as Mr. Bauta did. When Colonel Smith testified he said the

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1 seat in front of Mr. Bauta deflected. I think he called it  
2 plastic deformation. And that lessened the forces on him.  
3 You had the Delta V of 16 when the accident happened.  
4 Mr. Bauta strikes the seat in front of him. It deforms, it  
5 absorbs energy and lessens the biomechanical forces on him.

6 Mr. Osborn didn't have that. Mr. Osborn had a Delta  
7 V of 16 and nothing in front of him to strike and absorb the  
8 energy. It's not surprising to me that Brandon Osborn would  
9 be the one person they would pick to try and spring this on us  
10 now.

11 What's also interesting is I ran into Mr. Ostroff in  
12 the bar at the hotel last night and we had a nice  
13 conversation. Mr. McElfish was there too. They didn't raise  
14 this issue then. He didn't raise it to me Thursday or Friday  
15 when he became aware of it as he indicates. They raise it  
16 when they come into court when you come onto the bench. You  
17 denied it at the time. It should be denied again. Thank you.

18 THE COURT: Last word.

19 MR. McELFISH: First of all, the motion that's being  
20 referred to, the original motion in limine, was the  
21 defendant's motion to exclude any reference to any injury of  
22 any other passengers. Our opposition was no, that -- well,  
23 that's fine, except we have to get into evidence Ms. Wang and  
24 you granted that motion. It's their own motion to exclude any  
25 other injuries of any other passengers and you did a cutout

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1 for Ms. Wang. In opening statements, he told the jury the  
2 people in the back of the bus don't feel the impact. Most of  
3 the serious injuries are in the front of the bus and then he  
4 went on to cross examine at page 756, Colonel Smith, on  
5 whether or not he compared or looked at the other injuries on  
6 the bus to the other passengers to see if they were subjected  
7 to the same force and grilled him, essentially, because he  
8 didn't bring the medical records of those other folks with  
9 him. And that was after you told him; whether you said it  
10 that way or a different way, I don't know. I can only go by  
11 what's in the record.

12 He was on notice it would open the door and then he  
13 opened the door and now we're here to make our application. I  
14 think it's pretty clear. He had neck injuries. And may  
15 Mr. Ostroff address the injury briefly?

16 THE COURT: No.

17 MR. McELFISH: Okay. He had neck injuries. He had  
18 jaw injuries. He had teeth knocked out. He went several  
19 aisles down. How can you argue that -- certainly based on  
20 what they've go so far they're going to argue to the jury well  
21 Mr. Bauta couldn't have been injured because he wasn't in the  
22 front of the bus. I would like to --

23 THE COURT: That is not what they said in their  
24 opening.

25 MR. McELFISH: Oh, it is.

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1 THE COURT: No, it is not.

2 MR. McELFISH: They said the more serious injuries  
3 were in the front of the bus --

4 THE COURT: They did not say that Mr. Bauta was not  
5 injured.

6 MR. McELFISH: They said the people in the middle  
7 and the back got bumps and bruises.

8 THE COURT: You just said they were going to say  
9 that Mr. Bauta was not injured that would be inconsistent with  
10 their opening. They said Mr. Bauta was injured. The only  
11 question was the extent of his injuries.

12 MR. McELFISH: Let me be clearer then. What they  
13 said and what they're going to say based on that evidence is  
14 that the more serious injuries took place in the beginning of  
15 the bus, like Mr. Soberay (ph) and that the people in the back  
16 of bus were had more minor injuries. You're right they said  
17 he had more minor injuries and they used the phrase bumps and  
18 bruises. Okay, well, we have a passenger in the back of the  
19 bus who didn't have bumps and bruises. It is narrowly  
20 tailored to rebut that evidence and I will keep it short.

21 THE COURT: It is to say is a traumatic brain injury  
22 more or less severe than a broken jaw --

23 MR. McELFISH: Or knocked out teeth.

24 THE COURT: -- which is more severe.

25 MR. McELFISH: It goes to the force.

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1 THE COURT: It does not. I will take it under  
2 advisement. We do not need to decide it now, but I am  
3 inclined to deny it.

4 MR. McELFISH: -- if you decide to change your mind  
5 and grant it, I will keep it short.

6 THE COURT: I will give you plenty of time to get  
7 this guy up from wherever he is to testify.

8 MR. BARMEN: Your Honor, since we're discussing  
9 issues there is one relative to Dr. Thomas. Would you like us  
10 to address it now or wait until Dr. Thomas testifies.

11 THE COURT: Doesn't Mr. Whitlock have to catch a bus  
12 or a train?

13 MR. BARMEN: Mr. Whitlock is here and is prepared to  
14 go.

15 THE COURT: What time is his train?

16 MR. BARMEN: He just needs to be out of here by  
17 lunch. He is fine.

18 THE COURT: Raise your voice.

19 MR. BARMEN: I went back through, like Mr. McElfish,  
20 the transcript of Dr. Thomas. Dr. Thomas testified in his  
21 direct on Thursday which is set to be complete this morning  
22 that he believes that the PTSD suffered by the plaintiff in  
23 this case was significant and the symptoms of that were the  
24 fact that he's quiet and he has a startled response. He then  
25 went on to say at page 802 of the transcript, Your Honor,

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1 that: "I don't know too much more about his symptoms so I  
2 couldn't come to a real definitive conclusion about the PTSD."

3 We request that any reference to the PTSD or any  
4 suggestion that Dr. Thomas diagnosed the plaintiff with PTSD  
5 be stricken, because he did not.

6 THE COURT: Do you want to respond, Mr. McElfish?

7 MR. KIEFFER: I will respond. Dr. Thomas' testimony  
8 is not concluded. As the Court knows, we had a sidebar about  
9 issues related to this qEEG treatment and how evidence on that  
10 will be permitted. There may be additional questioning of  
11 Dr. Thomas concerning PTSD. Dr. Thomas' records, certain of  
12 which I hadn't had an opportunity to get to yet, appear to  
13 state quite clearly that he had -- he made a diagnosis of  
14 PTSD.

15 For example, there is Exhibit P 364, page four.  
16 There is a not in Dr. Thomas' chart that has been admitted  
17 dated February 18, 2016 where it states PTSD is significant  
18 for this man but is very quiet this and will not talk about  
19 the PTSD even if asked. And then goes on an elaborates  
20 further on that topic and some others. I think Mr. Barmen is  
21 free to cross-examine him on it but his direct testimony  
22 hasn't been concluded yet so I don't think it's proper to take  
23 snippets of it and try to wall off certain topics.

24 MR. BARMEN: Again, he's already testified  
25 definitively at page 802 of the transcript: "So I will not

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1 say he's diagnosed with it." It's relative to the PTSD,  
2 because he couldn't come to that conclusion.

3 MR. KIEFFER: Well, he certainly came to that  
4 conclusion in his chart that I hadn't yet had an opportunity  
5 to ask him about.

6 THE COURT: First of all, it is not a note in his  
7 chart. It's an e-mail he sent to Dr. Honor. It's not quite a  
8 note in his chart. He threw everything into his chart. His  
9 testimony struck me that he did not diagnose him at the time  
10 with PTSD. He said I don't know. I think those were his  
11 exact words at trial. So if he says that now, regardless of  
12 what is in his notes, how can he, like a treating  
13 neuropsychologist, be allowed to opine on PTSD?

14 MR. KIEFFER: Your Honor, however you want to  
15 characterize this and I'm putting the characterization of  
16 whether it's an e-mail or a note. It's his words. It's his  
17 narrative explanation addressing an issue. And he was  
18 specifically asked by Dr. Honor what his thoughts were on  
19 PTSD. He didn't say at the time when he was treating him, I  
20 don't know, I cannot tell, I cannot make a diagnosis.

21 What he said was, yes, PTSD is significant for this  
22 man and then he went on to elaborate on it. His testimony of  
23 Thursday is what it what is, but to me the import is was he  
24 was not done. We adjourned. He is still on the stand and on  
25 direct. If there's a feeling when his direct and his cross

1 concludes that the testimony doesn't execute the cut the  
2 mustard, I'm sure the Court will do as it sees fit, but I  
3 don't think it's fair for the plaintiff to in effect penalize  
4 the plaintiff's evidence from a treating physician just  
5 because we had to adjourn his testimony in the middle.

6 MR. BARMEN: Your Honor, the testimony regarding the  
7 PTSD was long before the adjournment of the testimony for the  
8 day on Thursday and when he said the PTSD was significant, he  
9 gave two reasons; the man is quiet and he -- a startled  
10 response. Certainly that's not the diagnosis standard under  
11 DSM-5 for definitive diagnosis of PTSD, he clearly said he  
12 couldn't do it. Simply sending a note or letter to Dr. Honor  
13 saying it was significant does not get them to a standard to  
14 allow a treating physician, who never formally diagnosed  
15 somebody according the DSM-5 with PTSD to tell the jury he has  
16 it.

17 THE COURT: Other than this e-mail that he sent to  
18 Dr. Honor, is there any evidence that Dr. Thomas diagnosed at  
19 the time Mr. Bauta with PTSD?

20 MR. KIEFFER: I believe that is the evidence, Your  
21 Honor.

22 THE COURT: I know that's not your application but  
23 I'm going to strike that testimony because he did not make  
24 that diagnosis. An e-mail to another retained expert is not  
25 enough especially if he follows up the significant PTSD with I

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1 don't push him on it. He doesn't talk about it.

2           You know, that is not enough to qualify as a  
3 diagnosis under the DSM-5 which it has to be. If you can show  
4 me references in Dr. Thomas' notes, I think there are five or  
5 six, required elements in the DSM-5 for someone to be  
6 diagnosed with PTSD and you can show me that, but you do not  
7 need it. You have Dr. Honor. Dr. Honor's diagnosed him with  
8 PTSD so what's the big deal?

9           MR. KIEFFER: My position, Judge, would be to the  
10 extent that Mr. Barmen wants to quibble about DSM-4 or DSM-5,  
11 treating physicians all the time have records. Some are scant  
12 and some are verbose, and I don't know that just because he  
13 wasn't verbose on that point him renders him ineligible to  
14 testify about it as a treating physician.

15           MR. BARMEN: I don't think raising the legal  
16 standard in the state of New York is quibbling, number one.  
17 You made your ruling, Your Honor, and I would ask consistent  
18 with that, a curative instruction to the jury to disregard  
19 Dr. Thomas' testimony relative to PTSD. Thank you.

20           THE COURT: Anything else?

21           MR. BARMEN: Nothing from the defense.

22           MR. McELFISH: Later I will have something.

23           THE COURT: Is Mr. Whitlock in the hall?

24           MR. BARMEN: Yes, Your Honor.

25           THE COURT: Let's get the jury. Everything is set

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1 with the transcript for read back?

2 MR. McELFISH: What?

3 THE COURT: The transcript for read back later  
4 today?

5 MR. McELFISH: Yes, Lichy.

6 THE COURT: No, because they sent us a  
7 revision again that they made changes which Mr. Saal can  
8 address.

9 We will do that later then.

10 (Jury enters.)

11 THE COURT: You may call your next witness.

12 MR. McELFISH: Thank you, Your Honor. The  
13 plaintiffs call Scott Whitlock.

14 THE COURT: Mr. Whitlock, please raise your right  
15 hand.

16 (Witness sworn/affirmed.)

17 THE COURT: Please be seated. Tell the court  
18 reporter your name and please spell it.

19 THE WITNESS: Scott, S-C-O-T-T, Whitlock,  
20 W-H-I-T-L-O-C-K.

21 THE COURT: You may inquire.

22 **SCOTT WHITLOCK,**

23 called by the Plaintiff, having been

24 first duly sworn, was examined and testified

25 as follows:

Whitlock - direct - Kieffer

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1 DIRECT EXAMINATION

2 BY MR. KIEFFER:

3 Q By good morning, sir.

4 A Good morning.

5 Q Who are you employed, Mr. Whitlock?

6 A Beau Dietl & Associates.

7 Q And who is Beau Dietl & Associates?

8 A It's an investigations company.

9 Q What kind of investigations does Beau Dietl & Company --  
10 & Associates do?

11 A Insurance fraud investigations, matrimonial  
12 investigations, Workers' Compensation.

13 Q Okay. How long have you worked for Beau Dietl &  
14 Associates?

15 A Five years.

16 Q And what's your title?

17 A Investigator.

18 Q And you are not a licensed private investigator; correct?

19 A No, I'm not.

20 Q You are one of several folks at Beau Dietl & Associates  
21 that undertook certain surveillance on the plaintiff in this  
22 case, Mr. Bauta, are you not?

23 A Yes.

24 Q Okay. You created certain records of your activities?

25 A Yes, I did.

Whitlock - direct - Kieffer

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1 Q Okay. Your first assignment to or involvement with  
2 Mr. Bauta was in July of 2016; correct?

3 MR. BARMEN: Objection, Your Honor. Leading. It's  
4 their witness.

5 THE COURT: Sustained.

6 Q When was your first involvement with Mr. Bauta, sir?

7 A I don't recall off the top of my head but I believe it  
8 was in 2016. I don't have the exact date.

9 Q If there are records and testimony in this case including  
10 testimony from you that your first involvement was July 25th  
11 of 2016 do you have any reason to dispute that?

12 A That sounds like it.

13 Q What was the assignment that you were given on that date  
14 with respect to Mr. Bauta?

15 A If I recall I believe that date we were assigned to start  
16 at one of the claimant's doctor's offices. I think it's a PT0  
17 office that he was supposed to have physical therapy  
18 treatments.

19 Q All right. And how was it that you knew who you were  
20 looking for?

21 A I was given the information from my boss.

22 Q Were you given a photograph of Mr. Bauta?

23 A Yes.

24 Q All right. Now, this physical therapy office that you  
25 mentioned, what did you do, did you go to the office?

Whitlock - direct - Kieffer

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1 A Yes.

2 Q Did you go in a vehicle. I believe I drove my car there.

3 And were you alone or were you with someone?

4 A At that PTO office, I was with the second investigator.

5 Q And on was that?

6 A Chris Viggiano.

7 Q How long were you on location on July 25, 2016?

8 A I believe it was six to eight hours.

9 Q Is your typical shift in the six to eight-hour range?

10 A It varies. Generally they're eight hours.

11 Q You said generally they're eight hours?

12 A Yeah, but it could go long other or shorter.

13 Q Typically you don't go out just for an hour or two?

14 A No.

15 Q On that date, your first surveillance of Mr. Bauta, you  
16 did not see him; correct?

17 MR. KIEFFER: Objection.

18 MR. BARMEN: Objection, leading.

19 THE COURT: Sustained.

20 Q Did you see Mr. Bauta on July 25th?

21 A I don't remember.

22 Q You don't recall at all?

23 A I'm not sure.

24 Q Do you recall giving a deposition in this case sir?

25 A Yes.

Whitlock - direct - Kieffer

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1 MR. KIEFFER: Your Honor, may I?

2 THE COURT: 447.

3 MR. BARMEN: Page and line, please.

4 MR. KIEFFER: I'm getting there. On page 28, sir.

5 MR. BARMEN: 447. Your Honor, if that's one of ours  
6 it's 397-45.

7 THE COURT: Never mind. I have it. I'm sorry.

8 MR. KIEFFER: Let me withdraw that question and ask  
9 a different question.

10 Q Sir, if you had seen Mr. Bauta on that date, July 25,  
11 would you have made some sort of recording of that?

12 A Yes.

13 Q And how would you have recorded your sighting of  
14 Mr. Bauta, would you have done it via something like  
15 videotape, would you have done it via a written report or  
16 both?

17 A Well, first I would use a videocamera. It's like a  
18 camcorder type of camera and after the surveillance is  
19 complete I write a report based on what I saw.

20 Q Let me ask you about this camera. What kind of a camera  
21 do you use?

22 A It's -- the one I use currently is a Panasonic HD camera.

23 Q This is a hand-held videocamera?

24 A All of them are.

25 Q You also use some kind of a covert camera?

Whitlock - direct - Kieffer

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1 A Yes. It is more of, like, an Apple iTouch, if you want  
2 to call it. It has video capability and also date and  
3 timestamp on it as well.

4 Q This covert or Apple iTouch type of camera, is that  
5 something you hold?

6 A Yes.

7 Q It's not something that goes in a buttonhole or something  
8 on your person?

9 A It's like a cell phone.

10 Q Is it something that can be seen by a bystander, for  
11 instance?

12 A Sure.

13 Q If the only video that has been produced to us in this  
14 case from you dates from February 2, 2017 and April 21, 2017,  
15 would that indicate those are the only dates that you actually  
16 physically saw Mr. Bauta?

17 A Yes.

18 Q Otherwise you would have endeavored to make some kind of  
19 a recording of that; correct?

20 A If I had seen him, I would have tried to videotape him  
21 but I didn't see him.

22 Q You went out on a number of instances looking for  
23 Mr. Bauta; correct?

24 A Yes.

25 Q Okay. You went out on August 1st and 2nd and 5th and 6th

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1 and 16th and 18th and 20th; correct?

2 A Yes.

3 Q All right. And you did not see Mr. Bauta on any of those  
4 seven dates, true?

5 A No.

6 Q So if you didn't see him, you didn't see him engaging in  
7 any activities; right?

8 A No.

9 Q Were those shifts typically six to eight hour shifts like  
10 your shift on July 25th?

11 A I don't remember exactly but I don't believe so.

12 Q Were you typically accompanied by another investigator on  
13 those dates?

14 A Not always. I don't think I was.

15 Q On none of them?

16 A Well, it depends on where they were. If it was in the  
17 City most likely I would have had a second investigator with  
18 me.

19 Q And why is that?

20 A Just the setup of the City. Multiple means of egress for  
21 the claimant to leave, to either walk or take a cab or take  
22 the train, so typically you have two investigators in the City  
23 surveillance.

24 Q You went out in January, January 19th and January 30th  
25 looking for Mr. Bauta; correct?

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1 A I don't remember but if it's in the depo, then yes.

2 Q If you testified that you went looking for Mr. Bauta on  
3 January 19th and January 30th, you're not changing your  
4 testimony today?

5 A No.

6 Q Those would also typically be six to eight-hour shifts?

7 A I would think so.

8 Q Do you know if you were accompanied by any other  
9 investigator on those dates?

10 A I don't recall. It depends on what it was.

11 Q You went looking for Mr. Bauta on February 1st, 2nd, 3rd  
12 and 5th as well, true?

13 MR. KIEFFER: Objection, leading.

14 THE COURT: I will allow it.

15 A Do you know what page that's on?

16 Q Do you recall, sir?

17 A If it's in the deposition, then yes.

18 Q If you testified under oath that you went looking for  
19 Mr. Bauta on February 1st, 2nd, 3rd and 5th, you're not giving  
20 different testimony today?

21 A No.

22 Q Okay. The only one of those days that you actually saw  
23 Mr. Bauta was on February 2nd; correct?

24 A Yes.

25 Q Okay. And what did you observe on February 2nd?

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1 THE COURT: Do you remember as you sit here today?

2 THE WITNESS: Off the top of my head, I don't  
3 recall.

4 A Off the top of my head I don't recall.

5 Q Do you recall starting surveillance about 9 a.m.?

6 A I believe so.

7 Q Do you recall you started that at the office of  
8 Mr. Bauta's physical therapist?

9 A Yes.

10 Q You recall that later in the day your supervisor,  
11 Mr. Lanigan, told you to change locations and go to the office  
12 of a Dr. Thomas?

13 A Yes.

14 Q And you did that?

15 A Yes.

16 Q And that was approximately at 2 p.m.?

17 A I believe so, yes.

18 Q When you got to Dr. Thomas' office, did there come a time  
19 when you observed Mr. Bauta exiting the office?

20 A Yes, at approximately 5:07 p.m.

21 Q And he proceeded walking toward Penn Station, did he not?

22 A Yes.

23 Q Did you follow him?

24 A Yes, I did.

25 Q Let me pause and ask a question, sir. When you are

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1 undertaking surveillance on a man like Mr. Bauta is it  
2 typically your goal to be seen or not be seen?

3 A Not be seen.

4 Q Okay. The goal, if you can achieve it, is to do it in  
5 secret, covertly so that the person you're studying doesn't  
6 know they're being watched; true?

7 A That's my goal.

8 Q So hopefully whatever you might observe or capture on  
9 video is natural and uncensored, for lack of a better word;  
10 true?

11 A I guess. I just prefer not to be seen with whomever I'm  
12 following.

13 Q As far as you were aware, when you began following  
14 Mr. Bauta on this day, February 2, 2017 from his doctor's  
15 office, he was not aware that you were following him?

16 MR. KIEFFER: Objection.

17 A I don't believe so.

18 THE COURT: Overruled. You can the question.

19 A I don't believe so.

20 Q When you first observed Mr. Bauta exiting Dr. Thomas'  
21 office on February 2nd, he was carrying a cane, was he not?

22 A Yes.

23

24 (Continued on the following page.)

25

Whitlock - direct - Kieffer

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1 EXAMINATION CONTINUES

2 BY MR. KIEFFER:

3 Q And he walked with that cane as you followed him to Penn  
4 Station, true?

5 A Yes.

6 Q Okay. Did you proceed to follow him on into Penn  
7 Station?

8 A Yes.

9 Q Did he get on a train?

10 A Yes, I believe so.

11 Q Did you follow him onto the train?

12 A Yes.

13 Q And when you followed him through Penn Station and onto  
14 the train, he was continuing to walk with a cane, was he not?

15 A Yes.

16 Q He exited -- did he take one train or two trains that  
17 day?

18 A I recall he might have taken two -- two downtown trains,  
19 I believe.

20 Q Towards Brooklyn?

21 A Yes.

22 Q All right. And did you remain on -- did you follow him  
23 onto both of those trains?

24 A Yes.

25 Q Attempting to tape him all the while?

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1 A Yes.

2 Q And on both those trains, he continued to walk with his  
3 cane, or stand with his cane if he was occupying a space on  
4 the train?

5 A As I recall, I think he was sitting.

6 Q Do you recall Mr. Bauta exiting at New Lots Avenue?

7 A Yes.

8 Q And he walked several blocks, 10 or 11 blocks, to a  
9 residence in Brooklyn, correct?

10 A Yes.

11 Q And that residence is one that you had gone to before, at  
12 614 Bradford Street?

13 A I don't recall if I've ever been there or not.

14 Q Well, regardless of --

15 A Off the top of my head, I don't remember.

16 Q Pardon me?

17 A Off the top of my head, I don't know if I ever went to  
18 that residence or not.

19 Q Well, regardless of whether you'd been to that residence  
20 or not, you continued to follow Mr. Bauta this 10 or 11 blocks  
21 to a residence in Brooklyn, correct?

22 A Yes.

23 Q And during that entire time, he continued to walk with  
24 his cane?

25 A Yes.

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1 Q And you don't recall him carrying anything else other  
2 than his cane during this walk; true?

3 A I am mixing up dates. I thought he might have had an  
4 umbrella, but that might have been a different day.

5 Q All right.

6 A I believe it was just his cane.

7 Q Now, your surveillance continued into that evening,  
8 correct?

9 A Yes.

10 Q All right. And whenever you saw Mr. Bauta and you were  
11 able to observe him, was it your goal to -- I am going to say  
12 videotape, recognizing you are not -- I assume it's all  
13 digital, right?

14 A The video camera, you know, takes video.

15 Q Video images?

16 A Yeah.

17 Q Okay. And whenever you saw Mr. Bauta, was it your goal  
18 to take video images of what you saw?

19 A Yes.

20 Q And at some point, you took those images that you  
21 recorded and you uploaded them onto the system of your  
22 employer, Bo Dietl & Associates?

23 A Yes. Well, I go home. I upload it to my computer, and  
24 then I e-mail it and/or upload it to a track ops program that  
25 we have.

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1080

1 Q And at some point you review it?

2 A I just kind of plug it into the computer and make the  
3 video and upload it.

4 Q And make sure that it is actually -- that the file is  
5 actually being transferred?

6 A Not so much transferred, just make sure that it was made  
7 correctly, no errors.

8 Q And then, so far as you are aware, the video that you  
9 took on February 2nd of 2017 of Mr. Bauta and uploaded onto Bo  
10 Dietl & Associates's server, that was a complete copy of what  
11 you recorded that day?

12 A Yes.

13 Q Did you delete any of it?

14 A No.

15 Q Did you edit any of it?

16 A No.

17 Q Okay.

18 MR. KIEFFER: With the Court's permission, Your  
19 Honor, I'd like to have this on the small screens and publish  
20 it to the jury as well, and ask the witness some questions  
21 about the video that he took.

22 MR. BARMEN: No objection.

23 THE COURT: And what exhibit is this?

24 MR. KIEFFER: This is Exhibit 304.

25 THE COURT: It's defendant's 304?

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1 MR. KIEFFER: It's Plaintiff's 304; I'm sorry. My  
2 apologies. Plaintiff's 302, Judge.

3 THE COURT: And what date is this?

4 MR. KIEFFER: This particular video is February 2nd  
5 of 2017, commencing just before the 12-minute mark, on the --  
6 on the exhibit, because the videos are all put together in the  
7 exhibit.

8 THE COURT: So 304 is all of the videos?

9 MR. KIEFFER: Correct.

10 MR. McELFISH: 302.

11 THE COURT: Excuse me.

12 Thank you, Mr. McElfish. 302.

13 Do you have any objection to receiving this in  
14 evidence?

15 MR. BARMEN: No objection, Your Honor.

16 THE COURT: All right, I will receive  
17 Plaintiff's 302 in evidence.

18 (Plaintiff's Exhibit 302 was received in evidence.)

19 MR. BARMEN: And so I'm clear, 302 is the entirety  
20 of all the video we produced?

21 MR. KIEFFER: Yes.

22 MR. BARMEN: No objection.

23 THE COURT: Podium laptop?

24 MR. KIEFFER: Yes.

25 THE COURT: It's on your laptop, right?

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1 MR. KIEFFER: Yes, iPad. And if the Court would be  
2 kind enough to dim the lights a bit.

3 (Exhibit published.)

4 (Video played.)

5 BY MR. KIEFFER:

6 Q Sir, does this appear to be what you observed on  
7 February 2nd when you were filming Mr. Bauta?

8 A Yes, but I don't believe this is Mr. Bauta.

9 Q I'm sorry?

10 A I don't believe this is Mr. Bauta.

11 Q You had a couple of false starts, true, where you filmed  
12 an individual or two that you thought, perhaps, were Mr. Bauta  
13 and then realized it wasn't?

14 A Yes. But this, I believe, is Mr. Bauta here.

15 Q Mr. Bauta exiting the offices of Dr. Thomas?

16 A Yes.

17 Q And is this that portion of the walk to Penn Station?

18 A That just played before, but now this is where he got off  
19 the train at New Lots.

20 (Video continues playing.)

21 MR. BARMEN: Your Honor, when counsel is done  
22 playing this, can we have a brief sidebar before the next  
23 question, please?

24 (Video continues playing.)

25 Q Did you observe Mr. Bauta going into a grocery store?

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1 A Yes.

2 Q Okay.

3 (Video continues playing.)

4 BY MR. KIEFFER:

5 Q Did you see Mr. Bauta exit the grocery store?

6 A Yes.

7 Q Okay. You recall witnessing this personally?

8 A Yes.

9 Q Okay. Mr. Bauta appeared to be accompanied by several  
10 females?

11 A I think it was two or three.

12 Q And did you know who they were?

13 A No.

14 Q Okay. If these were family members who were assisting  
15 him with his grocery shopping, did you do any investigation  
16 that would have informed you of that?

17 MR. BARMEN: Objection.

18 THE COURT: Sustained.

19 Q Did you make any inquiry, sir, as to who these people  
20 were?

21 A I don't believe so.

22 Q Any inquiry as to what they were doing?

23 A Well, it was obvious they were shopping, but no.

24 Q And Mr. Bauta is carrying one bag there in his left hand?

25 A Yes.

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1 Q And these ladies are pushing a cart with other items in  
2 them, correct?

3 A Yes.

4 Q Where were you stationed, sir? Were you in a vehicle or  
5 on foot?

6 A I think I was on foot, but I don't remember a hundred  
7 percent. I'm pretty sure I was on foot.

8 Q This is the actual tape speed that you recorded, correct,  
9 it hasn't been slowed down?

10 A No, this is the actual speed.

11 Q Okay. So this would be an accurate representation of the  
12 pace Mr. Bauta was walking at that evening?

13 A Yes.

14 (Video continues playing.)

15 BY MR. KIEFFER:

16 Q Did these individuals all go to one address?

17 A Yes, I believe it was the Bradford Street address.

18 Q And you understood that to be Mr. Bauta's residence?

19 A I believed it was his residence at this time.

20 Q Okay. If you were to take an educated guess, sir, did it  
21 appear to you that he had been out grocery shopping,  
22 accompanied by certain females?

23 A Yes.

24 Q And did they help him, from what you could tell, transfer  
25 those groceries into his home?

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1 MR. BARMEN: Objection.

2 THE COURT: Sustained.

3 BY MR. KIEFFER:

4 Q What did you believe was going on here, sir?

5 A He went shopping and walked back home and went into his  
6 residence.

7 Q Okay. With these ladies?

8 A Yes.

9 Q And the groceries?

10 A Yes.

11 Q Okay. Did you remain on the outside of his residence for  
12 some additional period of hours on February 3rd? On  
13 February 2nd; I'm sorry.

14 A Yes, I believe so.

15 Q Your surveillance continued until about 11:00 p.m. that  
16 night, right?

17 A That sounds about right.

18 Q You didn't see Mr. Bauta come out again after that  
19 grocery shopping trip --

20 A No.

21 Q -- on February 2nd, correct?

22 A No.

23 Q And just for clarity, sir, when we see the -- an image of  
24 what appears to be a clock on an iPhone, you are taking a  
25 video shot of that, correct?

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1 A Yes.

2 Q And that's to document the fact that you are still on  
3 scene doing surveillance and attempting to capture anything of  
4 interest?

5 A Yes.

6 (Video stopped.)

7 BY MR. KIEFFER:

8 Q Sir, you also performed some surveillance on Mr. Bauta on  
9 April 21st, did you not?

10 A I believe so, yes.

11 Q And that day, you began your work at 7:34 a.m., true?

12 A If that's what it says in the depo, then yes.

13 Q Okay. Again, I am just trying to speed this along, sir.  
14 If you testified previously to that, you are not changing your  
15 testimony today, correct?

16 A No, I'm not.

17 Q You began your surveillance at Mr. Bauta's home on  
18 Bradford Street in Brooklyn, correct?

19 A Yes.

20 Q And after you didn't see him for a while, you were  
21 instructed to go to 275 Madison Avenue, because you were told  
22 that Mr. Bauta would be giving a deposition there that day?

23 A Yes.

24 Q Okay. And you waited for him to exit the building?

25 A Yes.

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1 Q And he did exit the building at 12:52 p.m., true?

2 A Yes.

3 Q And he exited with an individual that you believed to be  
4 his lawyer, Mr. McElfish?

5 A I didn't know who he was, but I believed it was his  
6 lawyer, yes.

7 Q He was there to give a deposition, and the gentleman  
8 accompanying him you believed at the time to be his lawyer?

9 A Yes.

10 Q And have you since learned that it was Mr. McElfish?

11 A Yes.

12 Q All right. And then you proceeded to follow Mr. Bauta  
13 and Mr. McElfish from the 275 Madison Avenue address?

14 A Yes. They left from 275.

15 Q All right. And you taped what you saw on that --

16 A Yes.

17 Q -- day, April 21st, as well, correct?

18 A Yes.

19 Q All right, let me show this to you.

20 (Video playing.)

21 BY MR. KIEFFER:

22 Q Is this what you recognize as video that you took on  
23 April 21st?

24 A No, I think this is the February 2nd, I believe.

25 Q Do you see Mr. McElfish up there on the left, in front of

Whitlock - direct - Kieffer

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1 him?

2 MR. BARMEN: Objection.

3 THE COURT: Sustained.

4 BY MR. KIEFFER:

5 Q Is this a video you took, sir?

6 A Yes. I'm just trying to see the date on the bottom left  
7 there.

8 Q This is as it was produced to us, sir.

9 A I believe this is the video from the doctor's office  
10 going to Penn Station.

11 Q You recognize this as video you took of Mr. Bauta?

12 A Yes.

13 Q Okay. Walking with his cane?

14 A Yes.

15 (Video continues playing.)

16 Q When you were taking surveillance of Mr. Bauta and  
17 Mr. McElfish insofar as --

18 MR. BARMEN: Objection, Your Honor. Sidebar,  
19 please. Sidebar, please.

20 THE COURT: Sure.

21 MR. BARMEN: Stop the video, please.

22 (Sidebar held outside the hearing of the jury.)

23

24 (Continued on the following page.)

25

Sidebar

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1           (The following sidebar took place outside the  
2 hearing of the jury.)

3           MR. BARMEN: The video he is showing clearly by the  
4 date stamp is still 2/2. They showed the back half of 2/2  
5 first; this is the earlier half of 2/2. Mr. McElfish is not  
6 there. Yet he keeps saying it's April 21st and he's with his  
7 lawyer, which is, frankly, false.

8           I would like a clarification to the jury that,  
9 consistent with the time stamp on the video, we are still  
10 talking about February 2nd, and that they showed the second  
11 half first, and this is the first half, where Mr. Whitlock  
12 first picked Mr. Bauta up on 2/2 without Mr. McElfish.

13           MR. McELFISH: It's your tape. We're playing it the  
14 way you produced it.

15           MR. BARMEN: Fine, but it doesn't change the fact  
16 that you keep saying it's 4/17 or 4/21 and it's not, and  
17 Mr. McElfish is not there.

18           MR. KIEFFER: He is there.

19           MR. McELFISH: I actually was there. I had the  
20 thing over my shoulder.

21           MR. BARMEN: No.

22           MR. KIEFFER: If I can respond to this.

23           That is being played as it was produced. There are  
24 some places you can barely -- there are some images that say  
25 2/2 down low and April 21st up high on the same screen. I

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Sidebar

1090

1 don't have any idea --

2 THE COURT: How can you say it's Mr. McElfish when  
3 the witness says he does not know who it is? So then do you  
4 want to testify?

5 MR. McELFISH: Swear me.

6 THE COURT: Then you cannot represent him for the  
7 rest of the trial. You want to testify, you cannot represent  
8 him for the rest of the case.

9 And you cannot say that's Mr. McElfish, because the  
10 witness does not know who it is.

11 MR. KIEFFER: It came up in his deposition and he  
12 said, Yeah, I think it was you; but I'll move on.

13 MR. BARMEN: Not on this tape. That's my point,  
14 there is tape where he's on it.

15 MR. KIEFFER: On an earlier frame, he's standing  
16 there with a bag over his shoulder.

17 THE COURT: Yes, but the witness does not know who  
18 it is.

19 MR. KIEFFER: That's fine. I'll move on.

20 THE COURT: You cannot testify either.

21 MR. KIEFFER: I'll move on.

22 THE COURT: So if you say it one more time, you are  
23 out of the case as a sanction. Do you understand?

24 Stop the nonsense, guys.

25 MR. McELFISH: Judge.

SAM

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Sidebar

1091

1 THE COURT: How long have you been practicing law?

2 MR. McELFISH: Judge --

3 THE COURT: How long have you been practicing law?

4 MR. KIEFFER: 22 years.

5 THE COURT: You know how to do it, do it right. You  
6 have been practicing longer than that and you know how to do  
7 it, do it right. If he does not know who it is, do not keep  
8 saying that's Mr. McElfish. That's Mr. McElfish. That's  
9 Mr. McElfish. If he said --

10 MR. KIEFFER: He said it at his deposition --

11 THE COURT: If he said it at his deposition --

12 MR. KIEFFER: I am just trying to avoid pulling it  
13 out.

14 THE COURT: Then with a specific piece of video, if  
15 you showed him the video at his deposition and he said, Yeah,  
16 that's Mr. McElfish, that's different.

17 Where did he say that?

18 MR. KIEFFER: I've got to go see that.

19 MR. McELFISH: Get your notes. Get your notes.

20 THE COURT: With this particular video?

21 MR. KIEFFER: I don't recall if it was with that  
22 particular video; I didn't take the deposition.

23 THE COURT: Then we have a problem.

24 MR. KIEFFER: I'll move on.

25 MR. BARMEN: I'd ask for a clarification for the

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Sidebar

1092

1 jury, because it paints the wrong picture in their eyes when  
2 it's the wrong video and they keep saying he's there.

3 THE COURT: Wait a second. What does it matter  
4 whether Mr. McElfish is in the video or not?

5 MR. KIEFFER: I think it matters that -- this  
6 witness has testified that on April 21st -- regardless of  
7 whether what they want to say about that particular frame,  
8 this witness has testified that on April 21st, he went to 275  
9 Madison Avenue because he knew Bauta was going to be giving a  
10 deposition there, and he waited and Bauta exited the building,  
11 and he followed Bauta, and Bauta was walking with someone who  
12 he assumed to be his lawyer. And I think it's relevant.  
13 There are images on he- --

14 THE COURT: What is that relevant to prove?

15 MR. KIEFFER: I think it's --

16 THE COURT: The fact that you cannot articulate it  
17 right now in a second-and-a-half indicates that it is not  
18 relevant.

19 MR. KIEFFER: I think it's relevant.

20 THE COURT: That you want to prejudice him. Oh,  
21 he's following him with his lawyer.

22 MR. KIEFFER: When he's a few feet away, yeah, I  
23 think the jury's entitled to know the circumstance of this  
24 surveillance.

25 THE COURT: Why? Why? What is the relevance of

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Sidebar

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1 that as to whether Mr. Bauta was injured or not --

2 MR. McELFISH: I'll tell.

3 THE COURT: -- or the extent of his injuries whether  
4 he was with his lawyer at any point in time?

5 MR. McELFISH: I'd be happy to tell you, if you want  
6 to see, it inside a second-and-a-half.

7 What they did is, they noticed his deposition and  
8 set up the surveillance and they couldn't find him. And the  
9 fact that he's with his lawyer is relevant to the fact that  
10 they only found him because he was with his lawyer.

11 You're telling me that's not a good argument?

12 THE COURT: So what? How is that relevant --

13 MR. McELFISH: I'm telling you.

14 THE COURT: -- to whether he was injured or not?

15 MR. McELFISH: It's relevant to the fact that they  
16 couldn't get tape on him. They couldn't find him. And so the  
17 only way they could get him is, they noticed a deposition to  
18 set him up so they could follow him. Okay.

19 THE COURT: That's still not --

20 MR. McELFISH: That's why it's relevant.

21 THE COURT: That's still not relevant to whether he  
22 was injured or not, and you know it.

23 MR. McELFISH: It's a good argument. You know it  
24 is.

25 THE COURT: Listen to me. Stop making bullshit

SAM

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Sidebar

1094

1 arguments, whether it's good or not. You are trying to dirty  
2 them up. That is not the point of a trial. The point of the  
3 trial is was Mr. Bauta injured in this accident and what are  
4 the extent of his injuries.

5 MR. McELFISH: Excuse me, you let convictions in,  
6 and you're on my case because we're trying to impeach an  
7 investigator who followed him around?

8 THE COURT: The convictions are relevant to his  
9 emotional state.

10 MR. McELFISH: Not yet, they're not. I haven't  
11 heard one piece of testimony yet.

12 THE COURT: Unless you can link it up with proof  
13 with this witness that that was Mr. McElfish, I am going to  
14 instruct the jury to ignore that testimony.

15 MR. KIEFFER: Okay.

16 THE COURT: All right? It's just not relevant.  
17 Let's move on.

18 (Sidebar concluded.)

19

20 (Continued on the following page.)

21

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Whitlock - direct - Kieffer

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1 (In open court - jurors present.)

2 MR. KIEFFER: May I proceed, Your Honor?

3 THE COURT: Yes.

4 MR. KIEFFER: Thank you.

5 THE COURT: Mr. Whitlock, how many days did you go  
6 out to try to obtain video on Mr. Bauta?

7 THE WITNESS: I don't know exactly, but I'm pretty  
8 sure I worked it at least 10 days, if not more.

9 THE COURT: At least 10 days, if not more. And on  
10 how many days did you observe Mr. Bauta?

11 THE WITNESS: Two days.

12 THE COURT: Two days?

13 THE WITNESS: Yes.

14 THE COURT: So 20 percent, at best?

15 THE WITNESS: I think yes, two days' worth of  
16 surveillance.

17 THE COURT: Is that uncommon in your practice, to go  
18 out a number of times and not be able to find someone, you  
19 know, 8 out of 10 times?

20 THE WITNESS: Depending on the case, you know,  
21 some -- some plaintiffs are hard to find, and some, we have an  
22 address for them and we know where to find them. So you can't  
23 really say is it common, because every case is different. But  
24 it is what it is, I guess.

25 THE COURT: Did you know when you went out on

Whitlock - direct - Kieffer

1096

1 April -- whether it was April 21st, April 22nd --

2 THE WITNESS: The second day that I saw him?

3 THE COURT: Yes.

4 THE WITNESS: Okay.

5 THE COURT: That he would be coming to or from his  
6 deposition?

7 THE WITNESS: I was under the impression that he  
8 would have been leaving for his deposition in the morning  
9 and/or leaving -- leaving from his residence to go to the  
10 deposition, and/or leave the deposition to go home.

11 THE COURT: Okay. So the chances are, you would  
12 have been more likely to see him on that day than had you done  
13 a random --

14 THE WITNESS: Yes.

15 THE COURT: -- stakeout, if you will?

16 THE WITNESS: Yes.

17 THE COURT: Were you similarly instructed on other  
18 days that he would be going to physical therapy or to a  
19 doctor's office, so that the chances were better that you  
20 would find him?

21 THE WITNESS: No, I don't believe so. The other  
22 days, I don't think we had -- we had any knowledge of the PT  
23 appointments. We were just kind of waiting to see if he  
24 showed up.

25 THE COURT: But you knew the address of the physical

Whitlock - direct - Kieffer

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1 therapist?

2 THE WITNESS: Yes.

3 THE COURT: And you knew the address of some of his  
4 other doctors?

5 THE WITNESS: Yes, I believe the one up in -- the  
6 one other doctor that was the first day we actually saw him.

7 THE COURT: Okay. Who was it that instructed you  
8 about the date of the deposition?

9 THE WITNESS: My boss, Sean Lanigan.

10 THE COURT: Sean Lanigan?

11 THE WITNESS: Yes.

12 THE COURT: Okay.

13 You can continue.

14 MR. KIEFFER: Thank you.

15 May I resume the video, Your Honor?

16 THE COURT: Sure.

17 (Video resumes.)

18 MR. BARMEN: Counsel, it was running on the small  
19 screen the whole time that was going on, if you want to back  
20 it up.

21 MR. KIEFFER: Yes. Let me see if I can do that  
22 here, let's see. Hang on just one second.

23 (Video stopped.)

24 (Pause.)

25 THE COURT: Ready for public display?

SAM

OCR

RMR

CRR

RPR

Whitlock - direct - Kieffer

1098

1 MR. KIEFFER: Yes, Judge, thank you.

2 (Video playing.)

3 BY MR. KIEFFER:

4 Q Sir, this is Mr. Bauta?

5 A Yes.

6 Q Okay. Approximately how far behind him were you walking?

7 A He and I were pretty close, maybe 10 feet away, maybe  
8 closer.

9 Q 10 feet, if not closer?

10 A Yeah -- yes. This is the second as well, going to Penn  
11 Station, I believe.

12 (Video continues playing.)

13 Q Sir, while you had Mr. Bauta in view, did there ever come  
14 a time when you shut the video off?

15 A Yes, I think I did right there, just before.

16 Q And why would you have done that?

17 A Might have had to grab my MetroCard out of my pocket, so  
18 I hit stop quick and started it back up.

19 Q Other than doing something like getting your card out of  
20 your pocket, was it your intent to videotape Mr. Bauta  
21 whenever you had eyes on him?

22 A Yes.

23 (Video continues playing.)

24 Q Was Mr. Bauta's cane a particular focus of what you were  
25 trying to document?

Whitlock - direct - Kieffer

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1 A Not really. It's just sometimes, it depends on the angle  
2 of the camera how it comes out. I try to get a full view.

3 (Video continues playing.)

4 BY MR. KIEFFER:

5 Q What camera were you using for this particular episode of  
6 video?

7 A This would have been the covert iTouch camera.

8 Q You are holding this in front of you?

9 A Yeah. Usually close to me.

10 Q I am not meaning to argue with you, sir, but I am trying  
11 to understand what's covert about something like an iTouch  
12 that you can hold in front of you; is it just that it's small?

13 A It's a term. I just used the term covert camera. It is  
14 small. It's the size of a cell phone, or a little bit  
15 smaller.

16 Q It's less obvious in your view to the subject that you're  
17 taping than if you're holding a camcorder?

18 A Yes.

19 MR. KIEFFER: That's all for now, Your Honor.

20 Thank you.

21 (Video stopped.)

22 Q Sir, the -- we established a moment ago, of all the  
23 different dates that you went out looking for Mr. Bauta, the  
24 only two dates that you actually observed him were  
25 February 2nd and April 21st, correct?

Whitlock - direct - Kieffer

1100

1 A Yes.

2 Q All right. And whenever you had eyes on him, you  
3 attempted to video document whatever you could about his  
4 activities?

5 A I tried to as much as I can.

6 Q All right. And on the occasions that you saw Mr. Bauta,  
7 he had his cane, true?

8 A Yes.

9 Q And on one date, you testified he might have perhaps had  
10 an umbrella as well?

11 A Yes.

12 Q Your shifts surveilling Mr. Bauta were typically six to  
13 eight hours and sometimes longer. For example, the one we  
14 looked at from February 2nd, that went until 11 o'clock at  
15 night?

16 A Yes.

17 Q Okay. Sometimes you were accompanied by a colleague or  
18 partner, and sometimes you went alone?

19 A Yes.

20 MR. BARMEN: Objection.

21 A Yes.

22 THE COURT: Overruled.

23 BY MR. KIEFFER:

24 Q In your observations of Mr. Bauta you never saw him run,  
25 true?

SAM

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RMR

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RPR

Whitlock - cross - Barmen

1101

1 A No, I don't think so.

2 Q You never saw him playing any sports?

3 A No.

4 Q You never saw him lifting any heavy objects?

5 A No.

6 Q And you never saw him without his cane?

7 A No, I never saw him without his cane.

8 MR. KIEFFER: Okay. Those are all the questions I  
9 have at the moment, sir. Thank you.

10 CROSS-EXAMINATION

11 BY MR. BARMEN:

12 Q Mr. Whitlock, how are you today?

13 A Very good, thank you.

14 Q Good. Good to see you again.

15 You are not here voluntarily today, are you?

16 A No, I was asked to be here.

17 Q You were actually subpoenaed to be here by the  
18 plaintiffs, correct?

19 A Yes.

20 Q Okay. You've been an investigator for how long in total?

21 A Overall, about six years now, I believe.

22 Q You had a job with another investigative company prior to  
23 joining Bo Dietl, correct?

24 A Yes.

25 Q Okay. And your job as an investigator for six years

SAM

OCR

RMR

CRR

RPR

Whitlock - cross - Barmen

1102

1 primarily has been this type of investigation, is that true?

2 A Yes.

3 Q Okay. You've seen lots of claimants over your six years,  
4 haven't you?

5 A Yes.

6 Q You've seen other people with canes, other than  
7 Mr. Bauta --

8 A Yes.

9 Q -- in that time?

10 A Yes.

11 MR. BARMEN: Can you roll the video of the subway,  
12 please, that we just saw? February 2nd.

13 (Video played.)

14 MR. BARMEN: That will do. That's the right one.  
15 That's the one he's heading to the subway. That's fine. Just  
16 run it, please.

17 (Video continues playing.)

18 BY MR. BARMEN:

19 Q Do you notice anything about how Mr. Bauta as using his  
20 cane on this day?

21 MR. KIEFFER: Objection.

22 THE COURT: Sustained.

23 MR. KIEFFER: Sidebar, Your Honor.

24 (Video stopped.)

25 (Sidebar held outside the hearing of the jury.)

Sidebar

1103

1           (The following sidebar took place outside the  
2 hearing of the jury.)

3           MR. KIEFFER: Look, if where he is going is trying  
4 to elicit opinion from this witness about the manner and means  
5 in which this man was walking with his cane, it's improper.  
6 There's no foundation, no foundation can be laid. This man  
7 isn't a doctor, a physical therapist, an occupational  
8 therapist. There's been no testimony he had sensors or  
9 devices that would enable him to form some informed judgment  
10 about how Bauta was using his cane.

11           The video speaks for itself. He's an investigator  
12 who followed him with a camera, and I think it's patently  
13 improper to get into all sorts of lay opinion about the manner  
14 he was using his cane. If he tossed his cane down -- sorry.

15           MR. BARMEN: He can testify to what he's observed.  
16 He said he's seen other people using his [sic] cane. I can  
17 lay more foundation by if he's seen people actually leaning on  
18 or putting weight on it or whether or not that was consistent  
19 with what he saw here. These are his personal observations.  
20 They brought him in here.

21           THE COURT: He has no particular expertise to render  
22 any opinion based on his personal observations of one person  
23 over another. I am not going to allow it.

24           MR. KIEFFER: Thank you, Judge.

25           (Sidebar concluded.)

SAM

OCR

RMR

CRR

RPR

Whitlock - cross - Barmen

1104

1 (In open court - jurors present.)

2 THE COURT: Ladies and gentlemen, I hate to do this  
3 to you, but we need to take a break. Ten minutes, restroom  
4 break for everybody.

5 (Jury exits.)

6 (Recess taken.)

7 (In open court - jury not present.)

8 THE COURT: You may be seated.

9 (Jury enters.)

10 THE COURT: Please be seated.

11 You may continue.

12 MR. BARMEN: Thank you, Your Honor.

13 EXAMINATION CONTINUES

14 BY MR. BARMEN:

15 Q Mr. Whitlock, when you are assigned an investigation, do  
16 you have any interest in the outcome of the investigation?

17 A No.

18 Q Do you get paid any differently whether you find somebody  
19 or you don't find somebody?

20 A No.

21 Q Do you get paid any differently if you find something  
22 interesting versus something mundane?

23 A No.

24 Q You just go out and do your job?

25 A Yes.

Whitlock - cross - Barmen

1105

1 Q Okay.

2 MR. BARMEN: Can you go back to the video of the  
3 subway, please? Just keep running that.

4 (Video played.)

5 BY MR. BARMEN:

6 Q When you are shooting this video, is there anything in  
7 particular you're looking for?

8 A Just trying to get an overall shot of the person that I'm  
9 following.

10 Q Okay. Just an accurate representation of how they  
11 appear?

12 A Yes.

13 Q Now, you testified --

14 MR. BARMEN: And you can just let that run.

15 Q You testified early on -- well, I guess on  
16 cross-examination that you had had 10 or 12 opportunities or  
17 assignments where you couldn't find Mr. Bauta.

18 A Yes.

19 Q And you actually only saw him twice?

20 A Yes.

21 Q Do you know if there was a mistake with the address that  
22 you had the first times you were trying to locate Mr. Bauta?

23 A I -- there was a different address that I believe I  
24 started at in the beginning, and there was no sign of him  
25 there.

Whitlock - cross - Barmen

1106

1 Q Okay. Did you also come to learn during the course of  
2 your being involved in the investigation that he didn't always  
3 stay in the same place?

4 A It appeared that way.

5 Q Okay. In situations like that, is it unusual, if you  
6 find out he is going to be at a particular place at a  
7 particular time, to set up shop there?

8 A Yes.

9 Q Is that standard operating procedure for someone in your  
10 profession?

11 A Yes.

12 Q Okay. You saw him on two days?

13 A Yes.

14 Q One, February 2nd, coming from -- I think you said a PT  
15 appointment.

16 A The first time was leaving a different kind of doctor's  
17 appointment.

18

19 (Continued on the following page.)

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Whitlock - cross - Barmen

1107

1 CROSS EXAMINATION

2 BY MR. BARMEN: (Continuing)

3 Q Do you know if it was a doctor related to the treatment  
4 he's alleging was necessary because of the accident at issue  
5 in this case or does it matter to you?

6 A I'm not sure. That's where I was told to go.

7 Q Okay. And the second time was April 21st. Do you know  
8 whether or not he was actually coming from a deposition that  
9 day?

10 A I was under the impression he was leaving from the  
11 deposition.

12 Q Okay. So both times you saw him he was in the city for  
13 issues related to this case; fair?

14 MR. KIEFFER: Objection.

15 THE COURT: Sustained.

16 Q Did you know the deposition that you think he was going  
17 to was related to this case? Did you know?

18 MR. KIEFFER: Objection.

19 THE COURT: Overruled.

20 THE WITNESS: I can answer it?

21 THE COURT: Yes.

22 A I believe anything related was regards to this case.

23 Q Okay. In your experience, is it unusual to see claimants  
24 when they're going to case-related doctors' appointments using  
25 something like a cane?

Whitlock - cross - Barmen

1108

1 MR. KIEFFER: Objection, Your Honor, prior ruling.

2 THE COURT: Overruled.

3 A Can you ask me that again. I'm sorry.

4 MR. BARMEN: I can try. Can you read it back for  
5 me, please.

6 THE COURT: Yes.

7 (Record read.)

8 MR. KIEFFER: Objection.

9 THE COURT: Overruled.

10 A It's not unusual.

11 MR. BARMEN: I don't have any other questions for  
12 you. Thank you, sir.

13 MR. KIEFFER: Your Honor, may we approach briefly,  
14 sidebar?

15 THE COURT: Yes.

16 (Sidebar held outside the hearing of the jury.)

17 (Continued on the following page.)

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Sidebar

1109

1 (The following sidebar held outside of the hearing  
2 of the jury.)

3 THE COURT: I have to crank up the white noise.

4 MR. KIEFFER: Your Honor, Mr. Barmen specifically  
5 went into money-related things: You don't have any interest  
6 in the outcome, you don't get paid anything more on the  
7 results. He clearly opened the door to the payment. This  
8 company was paid a certain amount of money. There was a prior  
9 in limine ruling. He weighed right in on money-related things  
10 trying to cloak this witness. His company was clearly paid  
11 substantial money with some patina of, you know, unbiased  
12 credibility as if he were law enforcement or something. We  
13 are entitled to present that evidence.

14 MR. BARMEN: I simply asked him -- first off, he  
15 doesn't get paid an exorbitant amount of money. Remember the  
16 motion in limine we filed, Your Honor, they want to say Beau  
17 Dietl & Associates got paid tens of thousands of dollars to do  
18 this investigation. I'm establishing through him he has no  
19 skin in the game what happens one way or the other. He is not  
20 management. He is not Beau Dietl. He is an investigator  
21 going to do his job. So any allegation that somehow the door  
22 is open on the motion in limine to the total amount of money  
23 paid for the surveillance is off base.

24 MR. KIEFFER: There was no reason to get into  
25 money-related issues with this witness.

MDL RPR

Sidebar

1110

1 MR. BARMEN: They clearly tried to paint him as bias  
2 or somehow paint him with some sort of broad-brush taint that  
3 bringing up this issue somehow he was doing something wrong.

4 THE COURT: I will allow you to ask him how much he  
5 gets paid and if he knows how much the company got paid.

6 MR. KIEFFER: Okay.

7 THE COURT: He probably doesn't, but if he does, he  
8 does.

9 MR. BARMEN: But do you know how much the company  
10 got paid, rather than you know the company got paid X.

11 THE COURT: Yes. You have to lay the foundation for  
12 it.

13 MR. McELFISH: For future reference, in addition to  
14 what Mr. Kieffer said, it opens the door not to just this  
15 witness, because it is all the same investigation, it opens up  
16 the door to how much the company was paid for witnesses who do  
17 have foundation for that information.

18 MR. BARMEN: I disagree, Your Honor, and I stand on  
19 my argument.

20 THE COURT: I will allow it, if they have knowledge.

21 MR. KIEFFER: Okay.

22 (Sidebar concluded.)

23 (Continued on the following page.)

24

25

Whitlock - redirect - Kieffer

1111

1 MR. KIEFFER: May I proceed, Your Honor?

2 THE COURT: Yes.

3 MR. KIEFFER: Thank you.

4 REDIRECT EXAMINATION

5 BY MR. KIEFFER:

6 Q Sir, Mr. Barmen asked you about the fact that you  
7 received a subpoena to come here to court to testify today.  
8 Do you recall that?

9 A Yes.

10 Q Okay. You're not a stranger to the litigation process.  
11 You have been required to testify under oath in other  
12 circumstances in other cases, have you not?

13 A Yes.

14 Q You understand that when you're undertaking covert  
15 surveillance on an individual that may end up being played in  
16 court and you may be called upon to come testify under oath  
17 about that; right?

18 A Yes.

19 Q All right. In fact, sir, to the extent that this  
20 subpoena was any inconvenience to you, you understand we  
21 specifically scheduled your testimony today to accommodate  
22 your own travel schedule?

23 A Yes.

24 Q All right. Mr. Barmen asked you some questions about  
25 money related to this investigation. Do you know how much

Whitlock - redirect - Kieffer

1112

1 your company, Beau Dietl & Associates, was paid for the  
2 surveillance that you and others did on Mr. Bauta?

3 MR. BARMEN: Objection.

4 THE COURT: Overruled.

5 A No.

6 Q No information about that at all?

7 MR. BARMEN: Objection.

8 THE COURT: Overruled.

9 A I'm not aware of what they billed to clients.

10 Q Sir, Mr. Barmen asked you some questions about other  
11 investigations you have been involved in and other people you  
12 may have surveilled that had canes. Do you recall those  
13 questions?

14 A Yes.

15 Q Okay. How long have you been in this investigation  
16 business?

17 A At least six years.

18 Q I'm sorry?

19 A At least six years.

20 Q And in that six-year period of time, how many individuals  
21 do you think you have done covert surveillance on?

22 A I would have no idea --

23 Q Hundreds?

24 A -- of numbers.

25 Probably, yeah.

Whitlock - redirect - Kieffer

1113

1 Q Okay. Have you encountered people who have said, for  
2 example, they could not lift heavy objects and yet through  
3 your surveillance you found them doing just that?

4 A Yes.

5 Q You didn't find that with respect to Mr. Bauta, did you?

6 A No.

7 Q Have you surveilled claimants that have said they  
8 couldn't run or they couldn't engage in vigorous physical  
9 activity and your surveillance showed them doing just that?

10 A Yes.

11 Q Okay. You never saw Mr. Bauta engaging in vigorous  
12 physical activity other than walking to and from doctors'  
13 appointments and grocery stores and depositions; true?

14 A Yes.

15 Q Okay. When you're given an assignment to secretly follow  
16 somebody like Mr. Bauta, what information are you given about  
17 the claims that they are making?

18 A Every case is different, but the information I'm usually  
19 provided with is an address. Sometimes we have a picture.  
20 Sometimes we don't and we might have information regarding an  
21 injury and sometimes we don't.

22 Q Okay. And in this particular instance, when you  
23 undertook this surveillance, you understood that Mr. Bauta was  
24 claiming physical injury?

25 A Yes. Some type of injury. I just wasn't sure what.

Proceedings

1114

1 Q All right. And -- strike that.

2 MR. KIEFFER: Those are all of the questions that I  
3 have, sir. Thank you.

4 MR. BARMEN: No questions.

5 THE COURT: Thank you. Mr. Whitlock, you're  
6 excused.

7 THE WITNESS: Okay. Thank you for accommodating me.  
8 (Witness steps down.)

9 THE COURT: Dr. Thomas?

10 MR. KIEFFER: Yes. We recall Dr. James Thomas.

11 THE COURT: Ladies and gentleman, we are going to  
12 continue with Dr. Thomas' testimony, I forget which day he  
13 started, but we will continue with his testimony. I do want  
14 to alert you to one thing, though. You may have heard  
15 testimony from Dr. Thomas about PTSD, post traumatic stress.  
16 I have stricken that testimony from the record, so you're not  
17 to pay it any mind going forward and certainly not in your  
18 deliberations. All right.

19 MR. BARMEN: Your Honor, in light of the PTSD issue  
20 and the instruction to the jury, I would request an admonition  
21 with Dr. Thomas going toward so we don't have to revisit this.

22 THE COURT: I don't think we need that.

23 MR. BARMEN: Okay.

24 THE COURT: As long as there are no questions about  
25 it.

Thomas - direct - Kieffer

1115

1 MR. McELFISH: These instructions are as to Dr.  
2 Thomas, not to Dr. Honor.

3 THE COURT: Dr. Thomas, I will remind you that  
4 you're still under oath. I don't have to swear you in again.  
5 If you could tell the court reporter your name again, because  
6 I think this is a different court reporter.

7 THE WITNESS: I am Dr. James Lawrence Thomas.

8 THE COURT: You may inquire.

9 MR. KIEFFER: Thank you.

10 **JAMES LAWRENCE THOMAS,**

11 having been previously duly sworn, was examined and  
12 testified as follows:

13 DIRECT EXAMINATION

14 BY MR. KIEFFER:

15 Q Good morning, Dr. Thomas.

16 A Good morning.

17 Q Sir, when we adjourned your testimony on Thursday, we  
18 were talking about some issues related to qEEG testing that  
19 you reviewed in relation to Mr. Bauta. Do you recall that  
20 general line of questioning?

21 A Yes.

22 Q My question at the moment is, sir, in Mr. Bauta's case,  
23 were you able to look at the results of successive qEEG's to  
24 determine if they showed improvement in Mr. Bauta's brain  
25 functioning as a result of your treatment?

Thomas - direct - Kieffer

1116

1 A Yes. They showed improvement.

2 Q All right. Would it be possible, sir, for you to  
3 demonstrate for the jury with reference to certain information  
4 in successive qEEG reports?

5 A So I refer to those pages that you have in my record? Is  
6 that....

7 MR. KIEFFER: Your Honor, can we have small screens  
8 only?

9 THE COURT: There we go.

10 Q Doctor, can you see the exhibit that is in front of you?  
11 It is Plaintiff's Exhibit 364, page 23.

12 A No, nothing shows up here. Oh, there it is.

13 Q Sir, to orient us, that is a page from a qEEG report of  
14 December 19, 2015; is that correct?

15 A Correct.

16 Q And I believe, according to your records, that is the  
17 first qEEG report related to Mr. Bauta?

18 A Correct.

19 Q Can you describe for the Court and jury, sir, what about  
20 the information on this exhibit, P-364-0023, is relevant to  
21 you in trying to assess whether or not Mr. Bauta's brain  
22 function is improving as a result of the treatment?

23 MR. BARMEN: Objection, vague.

24 THE COURT: Overruled.

25 A This is the first one. This doesn't show improvement.

Thomas - direct - Kieffer

1117

1 Q All right. So let me ask this, sir, what is it about  
2 Exhibit 364-0023 that gave you information to target your  
3 treatment to see if you could improve Mr. Bauta's brain  
4 function?

5 A Is there a way that we can put it on the big screen so  
6 that I could point out things for the jury?

7 MR. BARMEN: Objection.

8 MR. KIEFFER: Permission to publish, Your Honor.

9 THE WITNESS: Because I don't think it could be  
10 understood otherwise.

11 THE COURT: Plaintiff's Exhibit 364, has it been  
12 received in evidence?

13 MR. BARMEN: I don't believe so, Your Honor, and we  
14 discussed a couple of these pages the last time around. I  
15 don't think the foundation has been laid for this. We've had  
16 some other issues that we've discussed, including the ability  
17 to change the colors and the parameters.

18 THE COURT: Well, that doesn't go to admissibility.

19 MR. KIEFFER: We discussed a redaction, Judge.

20 THE COURT: I am going to receive Plaintiff's  
21 Exhibit 364 in evidence subject to redaction of the pages that  
22 we discussed previously and the pages we will discuss, I  
23 believe, going forward. The only thing I will permit you to  
24 show to the jury at this point in time are the particular  
25 pages of the qEEG test results that Dr. Thomas wants to

Thomas - direct - Kieffer

1118

1 explain to the jury how it showed improvement.

2 MR. KIEFFER: Understood.

3 THE COURT: So that includes page 23, and so I will  
4 publish that to the jury over the defendant's objection.

5 (Plaintiff's Exhibit 364 received in evidence.)

6 MR. KIEFFER: And, Your Honor, would the Court  
7 kindly turn the lights down for the jury.

8 THE COURT: Sure.

9 MR. KIEFFER: Thank you.

10 BY MR. KIEFFER:

11 Q Dr. Thomas, do you recall the question?

12 A Okay. So what you see here is a view of different  
13 parameters of the person's brain functioning as viewed from  
14 above. So I'm going to use my gizmo here.

15 This is the front (indicating). This is where the  
16 nose is (indicating). This is where the back is (indicating).  
17 These are the ears (indicating), and there are different  
18 variables that are assessed with this particular method. You  
19 can assess the power of the electrophysiology, which is in  
20 microvolts, a very small amount of electricity, which we all  
21 have. And you see how does it deviate from the normal person.  
22 So if somebody gets in an accident and bangs their head, they  
23 might have different things that are out of whack or very  
24 deviant.

25 Now, in this particular display, you have different

Thomas - direct - Kieffer

1119

1 frequencies delta, beta. These are slow waves. Alpha, beta  
2 and high beta. In a typical brain-injured person, you will  
3 have an excess of slow waves. Particularly in the front  
4 because no matter what kind of injury you have, you're going  
5 to have frontal contusions. You may also have -- so you see  
6 the excess of the yellow and the orange. And this is a scale.  
7 So here is three standard deviations above the mean, the red,  
8 and when you have blue, you have three standard deviations  
9 below the --

10 THE COURT: Can we have a sidebar, please.

11 (Sidebar held outside the hearing of the jury.)

12 (Continued on the following page.)

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Sidebar

1120

1 (The following sidebar held outside of the hearing  
2 of the jury.)

3 THE COURT: He is getting perilously close to  
4 showing qEEG results that indicate that he has a TBI. All  
5 right. Don't ask questions that are going to elicit a long  
6 narrative from him. Have him show the improvement, which is  
7 what you intended to do, between this and the next qEEG, and I  
8 think there are four of them in total; correct?

9 MR. KIEFFER: Yes. There were only two I was going  
10 to show him.

11 THE COURT: Because he started talking about  
12 standard deviation.

13 MR. KIEFFER: I had the paralegal give him another  
14 copy of your order on the motion in limine and I'm trying to  
15 tow the line.

16 THE COURT: Okay.

17 MR. KIEFFER: You know, he testifies the way he  
18 testifies, but I can ask him short --

19 THE COURT: If he crosses that line, then he is  
20 going to have a big problem. You might have a lot of  
21 testimony stricken. Just ask him a question, say this is the  
22 first one, I am going to show you the second one, can you show  
23 the improvement to the jury.

24 MR. KIEFFER: Okay.

25 THE COURT: That's the point, right?

Sidebar

1121

1 MR. KIEFFER: Okay.

2 THE COURT: You want to show the neurofeedback is  
3 helping him.

4 MR. KIEFFER: Yes, the treatment, okay.

5 (Sidebar concluded.)

6 (Continued on the following page.)

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Thomas - direct - Kieffer

1122

1 MR. KIEFFER: May I proceed?

2 THE COURT: Yes.

3 Q Dr. Thomas, let me ask you a slightly different question  
4 to follow up on the Court's instruction. This particular page  
5 that we are looking at is from the very first qEEG on Mr.  
6 Bauta, just to make sure we are clear on time; correct?

7 A Correct.

8 Q And is this what sometimes might be referred to as a  
9 baseline study?

10 A Yeah.

11 Q To get a sense of where Mr. Bauta was at about the time  
12 he sought treatment from you?

13 A Correct.

14 Q All right. If I may, Doctor, I'd like to direct you to  
15 Exhibit P-364-0047. I will pull it up here, give me just a  
16 moment.

17 And for the record, Doctor, Exhibit P-364-0047 is a  
18 similar page from a qEEG report of about 11 months later,  
19 dated November 19, 2016, all right.

20 MR. KIEFFER: Permission to publish that, Your  
21 Honor.

22 THE COURT: It should be up. There we go.

23 MR. KIEFFER: Okay.

24 MR. BARMEN: Same objection, Your Honor.

25 THE COURT: Same ruling.

Thomas - direct - Kieffer

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1 Q Dr. Thomas, can you explain to the jury how exhibit  
2 364-0047 provides you with information about whether the  
3 treatment that you had done for Mr. Bauta in those intervening  
4 11 months was or was not improving his brain functioning?

5 A It improved some parameters of his brain function. You  
6 might recall in your visual memory that there was a lot of red  
7 lines in the fourth from the top panel. There are a lot of  
8 red lines. That's the coherence variable. There were red  
9 lines in the front upper right quadrant and there were blue  
10 lines in the lower left quadrant and those have been improved  
11 so that they're not there. Those are excesses either in --  
12 excess energy of coherence or deficiency. The blue is  
13 deficient. That's how he improved, with those variables.

14 Q Okay. And the improvement that you believe is shown as  
15 between those two studies, is it your belief that's as a  
16 result of your treatment?

17 A That's my belief.

18 MR. KIEFFER: Your Honor, I would move to admit  
19 Plaintiff's Exhibit 364-0047.

20 THE COURT: Again, we are going to deal with the  
21 specific pages from Plaintiff's Exhibit 364 that will be  
22 admitted into evidence later.

23 MR. KIEFFER: Okay. Thank you.

24 Q Doctor, I have put back on the screen a page of your  
25 records that were admitted last week. This is, for the

Thomas - direct - Kieffer

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1 record, P-364-0012, and this is the side-by-side comparison  
2 results of the Halstead-Reitan Battery that you did in 2016  
3 and in 2017. You're with me?

4 A Yes.

5 Q And you testified last week that Mr. Bauta, between those  
6 two Halstead-Reitan Batteries actually showed some improvement  
7 in some of his scores?

8 A Yes.

9 Q Did you form a conclusion, Doctor, that if Mr. Bauta had  
10 been malingering, whether it would have been likely that you  
11 seen the type of improvement that you saw between those two  
12 scores?

13 MR. BARMEN: Objection.

14 THE COURT: Overruled.

15 A Well, malingering means that somebody is purposely trying  
16 to appear impaired. Well, if somebody wants to be impaired,  
17 they would have a lot of low scores. It would be logical to  
18 find that. If you test them a year later and they had been  
19 under treatment and the scores improved, you would think they  
20 weren't malingering, they were getting better. If they were  
21 malingering, they would try to have impaired scores.

22 And, actually, as an additional comment, he improved  
23 in the areas exactly how brain-damage people improve in almost  
24 every instance. He still is brain-damaged and he's close to  
25 the moderate range, but he has improved.

Thomas - direct - Kieffer

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1 Q Thank you. And just to follow up on your last comment,  
2 Doctor, what are those areas where you saw improvement in Mr.  
3 Bauta in the areas where you would expect to see a  
4 brain-damaged person improve?

5 A One of the most sensitive test is called a Category Test.  
6 It is a test of visual abstract reasoning and it is long and  
7 it is difficult. He went from a significant -- severe  
8 impairment range to a moderate impairment range. He -- I'm  
9 trying to... he went from 83 errors to 62 errors, so that's  
10 one major area.

11 You know, if you look in my report, my 2017  
12 Halstead-Reitan Battery report, it is much more clearly laid  
13 out. Can we go to that page of scores?

14 Q Well, bear with me. I'll have find it.

15 A I hope to help you.

16 Q Do you have it there with you, Doctor?

17 A Well, it is here, but I have this big book, you see.

18 That is P-164-102.

19 MR. KIEFFER: Permission to publish P-164-102, Your  
20 Honor.

21 MR. BARMEN: Same objection.

22 THE COURT: Overruled. It is overruled.

23 THE WITNESS: Touch there. Well, it is a little  
24 hard to see.

25 A Okay. I have been talking about the category test and

Thomas - direct - Kieffer

1126

1 this is -- okay, here's 2000 and -- let's see, 2016, the  
2 scores of the Halstead-Reitan Battery, and here's 2017.

3 If you can -- do you have the little things in front  
4 of you? Okay. All right.

5 So, Category Test improves.

6 Now, there's a scale of ranking each test. Three is  
7 severe impairment, two is moderate impairment, and one is mild  
8 impairment, and zero is no impairment. So if you go from  
9 three to two, it's an improvement. If you could from two to  
10 zero, it's an improvement.

11 MR. McELFISH: Your Honor, one moment, I want to  
12 tell him he can mark on the screen. You can mark on the  
13 screen.

14 Sorry for the interruption. Thank you.

15 THE WITNESS: Wow. Now that's a mess.

16 THE COURT: Just tap the screen and then it goes  
17 away.

18 A So -- wait a minute. These scores here, you can see  
19 generally the scores went down. One went up. It was trail B,  
20 went from two to three, like that.

21 Okay. So you add up all these scores and have  
22 various ratios and you get an overall index, general  
23 neuropsychological deficit scale. Anything over 50 is  
24 moderate impairment. Anything under 41 and above 25 is a mild  
25 impairment, okay.

Thomas - direct - Kieffer

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1 So here's is the moderate impairment in 2016.

2 Here's the overall mild impairment in 2017.

3 An additional thing to note is his IQ went up by  
4 about -- let's see. His IQ went up 14 points, overall. But  
5 his IQ went up in the performance area of functioning. That's  
6 visual and spatial and that kind of processing. So you can  
7 see that with -- with these tests (indicating), and then they  
8 went up in percentiles with these tests (indicating). I made  
9 a mess again. But anything that has an asterisk is a  
10 significant improvement. And those are the areas that people  
11 who recover from brain injury intend to improve at. So, I  
12 mean, it fits all the literature in the neuropsychological  
13 field. There we go.

14 Q Thank you, Doctor.

15 Does the fact that Mr. Bauta had shown improvement  
16 between those two battery of tests, does that indicate that he  
17 no longer needs treatment for his brain injury?

18 A He still has brain damage.

19 Q Okay. As you have continued to treat him, Doctor, have  
20 you reached an opinion or conclusion about whether Mr. Bauta  
21 needs further care and therapy for his brain damage?

22 MR. BARMEN: Objection.

23 A I would -- I can't say?

24 THE COURT: Overruled.

25 A Well, I would strongly recommend continued treatment.

Thomas - direct - Kieffer

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1 Q And what sort of continued treatment do you strongly  
2 recommend?

3 A I would continue to do what I've been doing. I might  
4 shift to more sophisticated neurotherapy methods.

5 Q And what sorts of methods are those?

6 A Well, there's some new techniques that I am being trained  
7 in in the last year called NeuroField and it combines very  
8 mild electrostimulation combined with neurotherapy to help  
9 improve brain functioning.

10 Q Have you reached a conclusion, Doctor, as to whether Mr.  
11 Bauta needs continued therapy of the kinds that you have been  
12 providing to him previously?

13 A The kind of work that I have been doing with him to me  
14 has shown improvement. I have data that we have just  
15 discussed that shows improvement. It is likely to be helpful  
16 for him to continue in this kind of work. I don't know if he  
17 will improve more or not. I think it's worth doing because  
18 we've had some progress so far.

19 Q All right. Thank you, Doctor.

20 MR. KIEFFER: I would move to admit P-364-0102.

21 THE COURT: Subject to redaction?

22 MR. KIEFFER: Yes.

23 THE COURT: I think I have already admitted it.

24 MR. BARMEN: Note my objection on the record.

25 THE COURT: Okay. It is received subject to

Thomas - direct - Kieffer

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1 redaction.

2 MR. KIEFFER: Thank you.

3 (Plaintiff's Exhibit P-364-0102 received in  
4 evidence.)

5 Q Dr. Thomas, did you create certain bills for services  
6 that you rendered to Mr. Bauta?

7 A Yes.

8 Q All right. We have those, sir, as Exhibit 365.

9 MR. KIEFFER: Your Honor, could I have small screens  
10 at the moment.

11 Q Dr. Thomas, Exhibit 365-0001 -- all right. It should be  
12 on the screen in front of you, 365-0001, is that the page of  
13 your billing statements?

14 A Yes.

15 Q And your billing runs from 365-0001 through 365-0021; is  
16 that correct?

17 A That's what you have. There's more since then, of,  
18 course.

19 Q All right. This would be bills through the last date  
20 that's shown here, January 30th of 2018; correct?

21 A Correct.

22 Q These are bills that you prepared yourself?

23 A Yes.

24 Q All right. Are the services -- the bills for the  
25 services that you generated, are they customary and reasonable

Thomas - direct - Kieffer

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1 and were the service necessary for the treatment that you  
2 provided to Mr. Bauta?

3 A Well, I think they're reasonable given the situation that  
4 I took on this case not knowing if I would with be paid or  
5 not. It is called a lien, and today I haven't been paid  
6 anything. It's been two and a half years.

7 Actually, the \$400 per hour is not high in  
8 Manhattan. It might even be a little bit lower than most  
9 attorneys.

10 MR. BARMEN: Objection.

11 THE WITNESS: Pardon me?

12 THE COURT: Sustained. I will strike that last bit.

13 A What was the other part of the question?

14 Q I think you answered that.

15 The question was, Doctor, were the bills that you  
16 generated for the services that you provided to Mr. Bauta, in  
17 your view, reasonable and customary in your field and do they  
18 correspond to services that were necessary for Mr. Bauta's  
19 treatment?

20 A Yes.

21 Q All right. Sir, regardless of whether your bills get  
22 paid or not, is it your intention to continue to treat Mr.  
23 Bauta?

24 A Yes.

25 Q For as long as you believe the care that you're providing

Thomas - direct - Kieffer

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1 to him results in improvement to him?

2 A Yes. Until he plateaus, yes.

3 Q All right. There are some visits where Mr. Bauta didn't  
4 make an appointment. Is that true?

5 A No. He made an appointment, but he didn't show up.

6 Q Thanks. Your answer is better than my question.

7 There were certain instances where there were  
8 scheduled appointments for Mr. Bauta and he either called and  
9 cancelled or in some instances did not show up?

10 A Most of the time he called and cancelled the same day,  
11 usually not before that.

12 Q All right.

13 A There are times where he didn't show up and I didn't get  
14 a call. Those were pretty few. Later, when he explained to  
15 me what happened is that -- you see, even though his pain  
16 problems improved, every once in a while he gets hit with a  
17 lot of pain and he can't do anything and he takes a pain pill  
18 and it knocks him out for a day. So those were some of the  
19 times.

20 Other times he had necessary things to do with his  
21 daughters. He has two teenage daughters and, let's say --  
22 they're good kids, but they need attention.

23 Q All right. And, Doctor, I don't want to take the jury's  
24 time going through numerous visits, but your records that we  
25 admitted into evidence last week, as it relates to

Thomas - direct - Kieffer

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1 appointments that Mr. Bauta either cancelled or didn't show up  
2 for, that's documented in your records; correct?

3 A Correct.

4 Q And to the extent that Mr. Bauta may have provided you  
5 with an explanation on a particular occasion as to why he had  
6 to cancel or why he didn't show up and the circumstances  
7 related to that, that's written down in your records as well?

8 A Correct.

9 Q All right. And for the many appointments that Mr. Bauta  
10 did keep with you, you documented on a visit-by-visit basis  
11 essentially what was done and what pertinent things he  
12 reported to you that might relate to the treatment decisions  
13 that you were making?

14 A Usually what he related to me was things that was  
15 happening in his family system, whether it was dealing with  
16 his daughters or his -- the daughter's mother or his father or  
17 something like that. They didn't really have to do with the  
18 treatment. The treatment is pretty -- you know, you set up  
19 somebody with biofeedback equipment and just run the equipment  
20 and it is pretty simple.

21 Q All right. Thank you.

22 MR. KIEFFER: Your Honor, I would move to admit  
23 Exhibit P-365, which are Dr. Thomas's bills.

24 THE COURT: Any objection?

25 MR. BARMEN: No objection.

Thomas - direct - Kieffer

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1 THE COURT: Received.

2 (Plaintiff's Exhibit P-365 received in evidence.)

3 MR. KIEFFER: Dr. Thomas, those are all of the  
4 questions that I have for you at the moment.

5 THE WITNESS: Okay.

6 (Continued on next page.)

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Thomas - cross - Barmen

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1 (Continuing.)

2 MR. BARMEN: May I proceed, Your Honor.

3 THE COURT: Yes.

4 MR. BARMEN: Thank you.

5 CROSS-EXAMINATION

6 BY MR. BARMEN:

7 Q Dr. Thomas, how are you this morning?

8 A Okay.

9 Q Bear with me, I'm going to jump around a little bit based  
10 on really starting on Thursday and getting back to you today.  
11 On Thursday you testified on direct examination that Mr. Bauta  
12 at some point reported an auditory problem to you.

13 Do you remember that testimony?

14 A Well, I knew it from talking with him. It also came up  
15 in the testing.

16 Q You did auditory testing of him?

17 A Yeah, that's part of the Halstead-Reitan battery. You do  
18 like this and they report if they hear you with both the  
19 right, left and both ears.

20 Q Did you ever discuss any auditory testing with Mr. Bauta  
21 with Dr. Honor?

22 A I don't think so, but he knows the battery. He knows  
23 that I would do that.

24 Q In your treatment notes do you make any indication of any  
25 auditory issue relative to Mr. Bauta?

Thomas - cross - Barmen

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1 A Probably not. I don't deal with it that much.

2 Q Have you ever seen the report of an Edmund Provder who  
3 did the life care plan for the plaintiff?

4 A No, I hadn't.

5 Q Can you pull up GL I 427-59.

6 MR. BARMEN: Small screens only, please.

7 MR. KIEFFER: Objection. Lacks foundation for this  
8 witness.

9 THE COURT: Sustained.

10 Q Do you know of any other indications in any medical  
11 record anywhere for Mr. Bauta that indicates any type of  
12 auditory problem?

13 A No, I don't.

14 Q And that's because you never reviewed his medical  
15 records, did you?

16 A That's true. I didn't review his medical records.

17 Q You didn't think they were relative to your care and  
18 treatment of him?

19 A Actually, no. I was treating his pain and his focusing  
20 and you, you know, just being able to pay attention and reduce  
21 his pain and try to get him to a state where he could sleep.

22 Q Right, because your two goals in treating this man was to  
23 lessen his pain and two, to help him to sleep?

24 A Correct. And to reduce his depression.

25 Q That's a third thing. Who diagnosed him with depression,

Thomas - cross - Barmen

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1 Doctor?

2 A I think Dr. Honor did and I did.

3 Q Dr. Honor retired -- is a retained expert and you a  
4 treating physician on a lien. Did anyone else ever diagnose  
5 Mr. Bauta with depression?

6 A I do not know that.

7 Q Have you ever even heard it suggested?

8 A I'm familiar with Dr. Honor's report and I see it myself.

9 Q Okay. You actually came to treat Mr. Bauta because of  
10 Dr. Honor, true?

11 A Correct.

12 Q Dr. Honor posted on a Listserve for any neuropsychologist  
13 willing to take on a brain injured patient on a lien; correct?

14 A I don't know exactly what he said, whether he said brain  
15 injured patient or just a patient. The Listserve happens to  
16 be a neuropsychology Listserve and pretty much everyone who is  
17 on the Listserve probably would assume, if it weren't stated,  
18 that it would be a brain injury patient.

19 Q You doctor, do you remember we've take your deposition  
20 three separate times in this case; correct?

21 A Correct.

22 Q One in February of 2017, again in April of 2017 and the  
23 last one was in November of 2017, true?

24 A Correct.

25 Q When I took your deposition --

Thomas - cross - Barmen

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1 MR. BARMEN: Well, before we do that, Page 17 on the  
2 small screen, please.

3 May I proceed, Your Honor?

4 THE COURT: You may.

5 BY MR. BARMEN:

6 Q Page 17, February 2, 2017 deposition starting at line  
7 eight.

8 A Okay. You want a response from me?

9 Q I'm waiting for the judge to allow me to proceed.

10 THE COURT: Go ahead.

11 Q When I took your deposition, sir, back in February of '17  
12 I asked you starting at line eight: "Okay, how did Mr. Bauta  
13 come under your care?" Your response was, "On a Listserve  
14 neuropsychologist Steve Honor, Dr. Honor, asked would anyone  
15 like to take on a treatment case of a brain injured patient on  
16 a lien." That's what you testified to back in February of  
17 last year; correct?

18 A Okay.

19 Q Dr. Honor did, in fact, post on that Listserve, Would  
20 anyone like to take on a brain-injured person; isn't that  
21 true?

22 A It looks like it is.

23 Q And in fact because of that, you believed Mr. Bauta was  
24 brain injured before you ever met him; isn't that true?

25 A I would have assumed that, sure.

Thomas - cross - Barmen

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1 Q So you went in with the assumption before you ever met  
2 him that he was brain injured, fair?

3 A Fair.

4 Q And, in fact, you were the only neuropsychologist on this  
5 Listserve to respond to Dr. Honor and indicate your  
6 willingness to take on this case on a lien are you aware of  
7 that?

8 A I wasn't aware of that until the last time I saw  
9 Dr. Honor which was last week, May 2nd. I wasn't aware that I  
10 was the only one.

11 Q But you have since discussed it with Dr. Honor since  
12 Dr. Honor testified before this jury, right?

13 A Well, he just told me I was the only one. I don't know  
14 if you'd call it a discussion but that's what he said.

15 Q When did you last speak to Dr. Honor?

16 A The day he was here.

17 Q You didn't speak to him over the weekend?

18 A Nope.

19 Q Did you speak to anyone over the weekend about the  
20 testimony that started on Thursday?

21 A Nope.

22 Q Isn't the reason you're the only one that responded to  
23 that Listserve is because the American Academy of  
24 Neuropsychology frowns upon doctors taking cases on liens?

25 A Well, I had responded to you, what's the alternative; to

Thomas - cross - Barmen

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1 not treat him when I knew I could help him. So your response  
2 in the deposition was -- when I said what's the alternative,  
3 you said don't treat him and I said, are you kidding? This  
4 guy needs help.

5 Q So you believe despite the fact that the American Academy  
6 of Neuropsychology believes it's unethical to take a patient  
7 on a lien, it would have been more unethical for you not to  
8 accept it?

9 A I don't accept the construct at all. I'm here to help  
10 people get better. You can twist it around into trying to  
11 make me a bad guy because I took somebody on a lien where I  
12 might not get paid at all.

13 Q Did you know at the time that you responded to  
14 Dr. Honor's post that he was under a state suspension for  
15 professional misconduct?

16 A Nope.

17 Q Are you familiar with your ethical standard 6.04?

18 A No, I don't memorize it. What is it?

19 Q Fees and financial arrangements of treating physicians.

20 A Go ahead, tell me what it is.

21 Q You're not supposed to take these things on liens.

22 A Show me that.

23 MR. KIEFFER: Objection. He's characterizing a  
24 document he hasn't shown to a witness.

25 A I looked at my ethical standards quite recently and I

Thomas - cross - Barmen

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1 didn't see it.

2 Q Did you look at 6.04?

3 A You can show me what it is. I don't memorize my ethical  
4 standards as a psychologist.

5 Q That's fine. We'll move on. Certainly as a treater you  
6 agree you have to remain objective and unbiased, true?

7 A Well, as a treater, yes. As a neuropsychologist you  
8 should be objective.

9 Q Okay. You spoke to Mr. McElfish before you ever met or  
10 spoke to Mr. Bauta, true?

11 A I don't recall.

12 Q Can you pull up plaintiff 410-0559, please. Go to 561,  
13 please. You signed this lien agreement with Mr. McElfish on  
14 November -- you signed it on November 5th of 2015; correct?

15 A November 5, 2015, yeah.

16 Q Mr. McElfish signed it on November 11, 2015; correct?

17 A That's what it says.

18 Q Mr. Bauta signed it on December 3, 2015; correct?

19 A Correct.

20 Q And you first treated Mr. Bauta in December of 2015;  
21 correct?

22 A I think that's correct.

23 Q So based on the timing, you had to have spoken to  
24 Mr. McElfish before you ever met or treated Mr. Bauta, true?

25 A Well, actually I had an attorney help me fix -- create

Thomas - cross - Barmen

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1 the lien so I think there was discussions between my attorney  
2 hand Mr. McElfish.

3 Q Can you answer my question, please, sir?

4 A I don't recall.

5 MR. BARMEN: Can you pull up depo 1, please, page  
6 21?

7 MR. McELFISH: What's the date?

8 MR. BARMEN: February 2nd of 2017.

9 Q Starting at line 1 through line 11. Do you have it up  
10 there, Doctor?

11 A Yes.

12 Q I asked you on page 21 of your first --

13 MR. KIEFFER: Objection, Your Honor. It's not  
14 impeaching.

15 THE COURT: Overruled.

16 Q The question was: "Understanding you're not an expert in  
17 this case, an expert witness, and you're a treating physician  
18 when did you first start communicating with Mr. McElfish or  
19 his office?" Your answer was: "Well, I don't know, but I  
20 guess it was -- I think the first treatment day I had was  
21 early December of 2015 and of course of must have talked with  
22 him, Mr. McElfish, before then and that's pretty much what I  
23 recall and that's about it." Was that your testimony in  
24 February of 2017?

25 A Well, I guess so since you have it written in front of

Thomas - cross - Barmen

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1 me.

2 Q You testified truthfully back in February of 2017; right?

3 A Yes, but I'm just as unsure then as I am now.

4 Q You weren't unsure then at all. You said you must have  
5 talked with him first.

6 A First. I think the first treatment day I have to -- and  
7 of course I must have talked with him. I'm kind of making a  
8 conclusion about what I think happened. I'm not absolutely  
9 sure. If you look at the grammar carefully before then and  
10 that's pretty much what I recall and that's it. Move on.

11 THE COURT: Move on.

12 A That isn't very conclusive.

13 THE COURT: That is stricken. Move on.

14 Q Okay. It was actually Dr. Honor that arranged for you to  
15 talk to Mr. McElfish before even met Mr. Bauta; correct?

16 A I don't know, I don't recall.

17 Q Page 23 of the deposition, please. Starting at line 16  
18 page 23, going true line 1 on page 24.

19 MR. BARMEN: May I proceed, Your Honor?

20 THE COURT: Hold on. Go to the top of the next  
21 page, please.

22 MR. BARMEN: Can you scroll down?

23 THE COURT: Okay.

24 A Okay.

25 Q I asked you: "After you responded to Dr. Honor on the

Thomas - cross - Barmen

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1 Listserve, you tell him you're willing to take a look at this  
2 what does Dr. Honor tell you about Mr. Bauta?" Your answer  
3 was: "He said it was -- I can't remember. I really can't  
4 remember very much. He said it was a big accident and he  
5 might have said something about Greyhound and he said  
6 Mr. McElfish's name and I don't remember specifically what  
7 happened after that, but I guess he arranged for McElfish to  
8 call me or me to call -- probably for McElfish to call me."

9 THE COURT: Does that refresh your recollection as  
10 to whether Dr. Honor suggested or arranged for a call between  
11 Mr. McElfish and you prior to you meeting Mr. Bauta?

12 THE WITNESS: I am no more than what I see in front  
13 of you, in front of me and you.

14 Q And that's fair. And I know it was a while ago. But  
15 what you are clear of is because of the agreement you have  
16 with Mr. McElfish, you have a financial interest in the  
17 outcome of this lawsuit, do you not?

18 A Yes.

19 Q And when you talked to Mr. McElfish and you were  
20 negotiating this lien agreement, he told you this case was a  
21 sure thing, didn't he?

22 A He might have said something like that. But you're  
23 asking me to believe an attorney, so maybe I would. They can  
24 say anything. But we're here now, aren't we?

25 Q We are. We are? Your real interest is helping Mr. Bauta

Thomas - cross - Barmen

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1 get better, true?

2 A True.

3 Q And certainly you would take all steps that you feel as  
4 his treater that are in his best interest; correct?

5 A As best as I can.

6 Q Unless of course you're concerned about not getting paid,  
7 fair?

8 A No.

9 Q Well, you did an initial neuropsychological battery on  
10 him blind when he first came to treat with you, right?

11 A Right.

12 Q And then in one of the depositions I took of you, I  
13 believe the second one, I asked you why you hadn't done  
14 another?

15 A Yeah.

16 Q And I think you've already told this injury that the  
17 second one you did you did at my suggestion?

18 A I thought it was a good suggestion. I thought well, I  
19 thought about it for a while and I thought that's a pretty  
20 good idea to do is to see his progress. And the Halstead  
21 Reitan battery is a good way to do it because it's  
22 well-validated in the field and there tends not to be a  
23 practice effect and I thought it was a good idea.

24 Q The reason you didn't do it prior to me suggesting it is  
25 because you usually charge \$3,500 for them and you weren't

Thomas - cross - Barmen

1145

1 getting paid; correct?

2 A I disagree with your insinuation.

3 Q I'm not insinuating anything.

4 A Oh, you certainly are.

5 Q Depo two, please. I'm referring now, Doctor, to your  
6 deposition from April of 2017, April 20th of 2017. Starting  
7 at page 62, line 23 and really going through the next several  
8 pages we had a discussion about why you hadn't done the second  
9 round of psychological testing. So let's start at the bottom  
10 of 62.

11 A This was a deposition that I never got the transcript. I  
12 asked you in a third deposition why I hadn't gotten the  
13 deposition to review and you said oh, yes, yeah. By the way,  
14 that's on record with the person who was, you know, using one  
15 of these little funny machines. And I never got a transcript  
16 from the third deposition to review which I believe I'm  
17 supposed to get.

18 Q Did you ever ask the Court Reporter for one?

19 A Who?

20 Q The Court Reporter, sir?

21 A I don't know who the Court Reporter is.

22 MR. BARMEN: Sidebar, sidebar

23 (Sidebar held outside of the hearing of the jury.)

24 (Continued on next page.)

25

Sidebar

1146

1 (The following sidebar took place outside the  
2 hearing of the jury.)

3 THE COURT: Did he request a copy of the deposition  
4 transcript?

5 MR. BARMEN: Well after the fact. I don't represent  
6 him. He was advised and had the option to review and sign or  
7 waive. I don't represent him. I didn't retain him. He was  
8 properly advised. He certainly got the first one.

9 THE COURT: When did he ask for the second  
10 deposition transcript?

11 MR. BARMEN: I believe he requested it during the  
12 third deposition, if I'm not mistaken. Maybe it was after.

13 THE COURT: And he hasn't been given copy of the  
14 second or third?

15 MR. BARMEN: He could have gotten to the Court  
16 Reporter any time he wanted to.

17 THE COURT: Whose responsibility is it to provide a  
18 deposition transcript once it is requested? Is it the court  
19 reporter or the party taking the deposition or the party who  
20 proffered the expert? The rule seems somewhat vague.

21 MR. BARMEN: I don't think I have that  
22 responsibility. They used this man as an expert despite the  
23 fact they call him a treater.

24 MR. McELFISH: If he's an expert we can let  
25 everything in.

Sidebar

1147

1 THE COURT: Before the deposition is completed the  
2 deponent must be allowed 30 days after being notified by the  
3 officer that the transcript or recording is available in which  
4 to review the transcript or recording; and if there are  
5 changes to form or substance to sign a statement listing the  
6 changes and the reasons for making them."

7 MR. BARMEN: And that's precisely what my  
8 understanding is, Your Honor. He was advised on the option to  
9 waive or read. If he would have requested it, the Court  
10 Reporter would have sent the transcript directly to him.

11 THE COURT: Did he request it during the third  
12 deposition --

13 MR. BARMEN: I don't recall.

14 THE COURT: -- before the deposition was completed?  
15 Once, twice, three times -- the third is the completion,  
16 right.

17 MR. BARMEN: I instruct even people I don't  
18 represent, I tell them I don't represent you but you have the  
19 right to read or waive. You can tell the Court Reporter what  
20 you want to do, and if he choses to read it the Court Reporter  
21 sends it to him, not me. I don't represent this man.

22 THE COURT: But you hired the Court reporter. Can  
23 you show me where the third deposition is, please.

24 (Continued on the following page.)  
25

SN

OCR

RPR

Sidebar

1148

1 (Continuing)

2 (The following sidebar took place outside the  
3 hearing of the jury.)

4 MR. BARMEN: Your Honor, look, this is the last  
5 deposition (indicating) and I tell him that in every  
6 deposition.

7 THE COURT: Did you ensure that she sent him a copy?  
8 You hired her, you hired her to take the deposition.

9 MR. BARMEN: I did hire her.

10 THE COURT: He asked for it.

11 MR. BARMEN: Judge, I did hire her. I have no  
12 reason to believe she didn't send him a copy. He got the  
13 first one.

14 THE COURT: Well, he claims he did not get it.

15 MR. BARMEN: And, respectfully, how is that my  
16 issue?

17 THE COURT: Because you hired the court reporter.  
18 She acts on your behalf. She is transcribing the deposition.  
19 She is your agent. He asked for it. If she did not send it,  
20 then that is on you. But are you going to go down this road  
21 and then you call her to say, yes, I sent it, here is proof?

22 MR. BARMEN: If need be, because I have three  
23 depositions of this witness. I think you get a sense for the  
24 rather difficult nature of this witness. I am going to need  
25 to refer to his deposition transcripts.

SAM

OCR

RMR

CRR

RPR

Sidebar

1149

1 MR. McELFISH: He's pretty well-natured, I think.

2 MR. BARMEN: I didn't say he wasn't.

3 THE COURT: Why don't you continue to do it and --

4 MR. MOROKNEK: Why not just ask him the question  
5 classically? In other words, Do you remember being asked a  
6 series of questions and having given these particular answers?  
7 And then read the question, here's the question, answer,  
8 here's the answer.

9 THE COURT: Not, Do you remember, were you asked  
10 those questions and did you give those answers. And then if  
11 he says, I don't know, I didn't review my transcript, move on  
12 to the next thing.

13 MR. McELFISH: Not, I didn't review my transcript,  
14 the defense never sent it to me.

15 MR. BARMEN: It's not incumbent upon the defense to  
16 send it to him.

17 MR. McELFISH: I'm sure it is.

18 MR. BARMEN: Thank you, Your Honor.

19 MR. McELFISH: Judge, there's one more thing.

20 MS. DIAMOND: Here's where he testified. It's  
21 Page 183 of his third deposition, which was November 2017.  
22 Page 183.

23 MR. KIEFFER: You can show it to the judge, if you  
24 like.

25 THE COURT: It does not really clarify.

SAM

OCR

RMR

CRR

RPR

Sidebar

1150

1 MR. BARMEN: No, it doesn't.

2 MR. MOROKNEK: Our concern is, are we going to rely  
3 on his memory? It's not that he did not get it, he does not  
4 remember getting it.

5 MR. BARMEN: I'll proceed as indicated, Your Honor.

6 But I'm wondering, it's going on 12:30, is this an  
7 appropriate time to take a break?

8 THE COURT: How much --

9 MR. BARMEN: I've got a while.

10 MR. McELFISH: Just remember you're paying for  
11 Cummings today. So if she doesn't get on and off today, it's  
12 not my dime.

13 MR. MANNION: She'll be here.

14 MR. McELFISH: No, but if we don't finish it --

15 THE COURT: We've got the other witnesses.

16 MR. BARMEN: I've got at least 90 minutes with him.

17 THE COURT: Let's go to 1 o'clock.

18 (Sidebar concluded.)

19

20 (Continued on the following page.)

21

22

23

24

25

SAM

OCR

RMR

CRR

RPR

Thomas, PhD - cross - Barmen

1151

1 (In open court - jurors present.)

2 EXAMINATION CONTINUING

3 BY MR. BARMEN:

4 Q Back to what we were talking about a few minutes ago,  
5 Dr. Thomas.

6 When I took your deposition on April 20th of 2017,  
7 do you remember me asking you this question, starting at  
8 line 23, counsel:

9 If it would be beneficial to determine if this  
10 person, Mr. Bauta, has improved --

11 MR. McELFISH: Excuse us a second, it's not on the  
12 screen.

13 MR. BARMEN: No, it's not on the screen.

14 MR. McELFISH: How do we --

15 MR. BARMEN: You have the transcript. I gave you  
16 the page. 62.

17 MR. McELFISH: Line.

18 MR. BARMEN: Starting at line 23.

19 MR. McELFISH: Go ahead.

20 BY MR. BARMEN:

21 Q Question: So if it would be beneficial to determine if  
22 this person, Mr. Bauta, has improved, you wouldn't do it  
23 yourself?

24 Now, to the top of 63.

25 Your answer was: I don't know.

Thomas, PhD - cross - Barmen

1152

1           Question: What would be the rationale to not do it  
2 yourself?

3           Your answer: Well, I'm putting in all this time  
4 without getting paid.

5           Was that your testimony back in April of 2017?

6 A       I guess so, since you have it written down.

7 Q       Okay. Now, on page 67 --

8 A       By the way, I did do it myself.

9 Q       I know. On page 67, when I was talking to you about the  
10 same issue, whether or not it makes sense to do a second  
11 battery of neuropsychological testing, I asked you at page 67,  
12 starting at line 9:

13           If it might be beneficial to the patient, isn't it  
14 incumbent upon you to do it?

15           And your answer was: I'm not sure.

16           MR. KIEFFER: Objection, improper impeachment.

17           THE COURT: Sustained.

18 BY MR. BARMEN:

19 Q       Doctor, did you always take appropriate steps in this  
20 patient's best interest, regardless of whether or not you were  
21 getting paid?

22 A       I think so.

23 Q       But, in fact --

24 A       By the way, this is not an example of that. It really  
25 doesn't matter who -- who would be doing the testing.

Thomas, PhD - cross - Barmen

1153

1 Q You didn't do it until I suggested it, because you  
2 weren't getting paid for it, correct?

3 A I disagree with that insinuation.

4 Q Well, it is not an insinuation, it is in fact what --

5 A Well, you're wrong.

6 Q -- what you testified --

7 A No.

8 Q You need to let me finish my question, sir, and I'll give  
9 you the same courtesy and let you finish your answer.

10 You, in fact, testified when I took your deposition  
11 in April of '17 that you didn't do it because you weren't  
12 getting paid.

13 You saw that testimony, right?

14 MR. KIEFFER: Objection --

15 THE COURT: Overruled.

16 MR. KIEFFER: -- cumulative; asked and answered.

17 THE COURT: Overruled.

18 BY MR. BARMEN:

19 Q So are you changing your testimony now?

20 A No, I'm not changing my testimony. I just don't think  
21 it's a big deal.

22 Q It's not a big deal for a treating physician who stated  
23 earlier it would have been a bigger ethical issue not to treat  
24 this man, rather than to take him on a lien, for that same  
25 physician to have testified they didn't do something they felt

Thomas, PhD - cross - Barmen

1154

1 was beneficial for the patient because they weren't getting  
2 paid.

3 Is that your testimony?

4 A I disagree with your assumptions.

5 Q Okay. It certainly benefits you to continue treating  
6 Mr. Bauta on this arrangement with his lawyer, doesn't it?

7 A It may not be useful. We don't know how this case is  
8 gonna come out.

9 Q So, perhaps, it is beneficial for you, right?

10 A It might be; it might not be.

11 Q Because, in fact, you might get paid?

12 A I might; I might not.

13 Q Okay. Have you made any other medical decisions relative  
14 to Mr. Bauta, with the consideration as to whether or not you  
15 are going to get paid, since we talked in April of 2017?

16 A I don't believe so, but keep in mind, I'm not a medical  
17 doctor.

18 Q That's right. You're not a medical doctor, true?

19 A True.

20 Q Going back to that, you said one of the things that you  
21 are now starting to treat Mr. Bauta with -- let me make sure I  
22 get this right -- is something called NeuroField?

23 A Yes.

24 Q And you agree NeuroField is not something that's accepted  
25 in the neuropsychological community?

Thomas, PhD - cross - Barmen

1155

1 A Well, wait a minute. I have to back up. I'm not  
2 treating him with NeuroField now. I haven't started doing  
3 that yet. I would plan to do it if I would continue.

4 Q You were just recently trained in NeuroField?

5 A Correct.

6 Q So I misunderstood. You haven't started it yet, but your  
7 intention is to do so?

8 A I would like to try it. It might be helpful.

9 Q Despite the fact that it is not accepted in the  
10 neuropsychological community, true?

11 A I don't know how it's accepted or not.

12 Q Well, isn't it true that most things that you do are not  
13 accepted in the neuropsychological community?

14 A Neuro feedback is starting to be accepted, not only in  
15 the neuropsychological field, but in the medical field.

16 Q Can you answer my question, please, sir?

17 A And -- rephrase the question.

18 Q Most of the things you do, your treatments relative to  
19 Mr. Bauta, are not accepted in the neuropsychological field,  
20 is that true?

21 MR. KIEFFER: Objection, asked and answered.

22 A No.

23 THE COURT: Overruled.

24 MR. BARMEN: Deposition Number 3, please, Page 107.

25 107, please. The deposition starts in the hundreds,

Thomas, PhD - cross - Barmen

1156

1 so it's one of the first pages.

2 Just give me line 25 and the next page, please.

3 BY MR. BARMEN:

4 Q Do you recall me asking you, when we were talking about  
5 NeuroFields in November of 2017, whether that was something  
6 that was accepted in the neuropsychological community?

7 Do you remember us having that discussion?

8 A Well, I'm reading what you had written that I said.

9 Q Take your time. First of all, I didn't write it, sir.

10 The court reporter did.

11 MR. KIEFFER: Objection, improper impeachment.

12 THE COURT: Overruled.

13 Q I asked you --

14 A Okay, what's your question?

15 Q I asked you, when you testified under oath in November --

16 THE COURT: Just do it the classic way, please.

17 MR. BARMEN: Okay.

18 Q Did I ask you, sir, if NeuroFields was something accepted  
19 in the neuropsychological field?

20 THE COURT: Sustained.

21 At your deposition, were you asked this question and  
22 did you give this answer:

23 This is something accepted in the neuropsychological  
24 community?

25 Answer: I'm sure it's not. Most things I know are

Thomas, PhD - cross - Barmen

1157

1 not accepted in the neuropsychological field, but they are  
2 accepted in neuroscience. Neuropsychology is very limited in  
3 its treatment methods, very limited. 95 percent of the  
4 neuropsychologists only do testing. That's kinda important to  
5 know, but may be beyond the scope of this particular case.

6 Were you asked that question and did you give that  
7 answer?

8 THE WITNESS: Yes.

9 By the way, I'm not seeing that on the screen.

10 BY MR. BARMEN:

11 Q Sometimes it goes black and you got to touch it.

12 A It's not black, it's just the page is a different page.  
13 Can I make it go -- well, I can't move the page.

14 Q No, he does that from here (indicating).

15 Neuroscience -- the position of neuroscience on  
16 taking positions on the lien is the same as the general  
17 neuropsychological community; it's against it, correct?

18 A I don't know that. I don't even know what organization  
19 you're talking about.

20 Q The American Academy of Neuroscience. What is their  
21 position on taking patients on liens?

22 MR. KIEFFER: Objection, it's cumulative.

23 THE COURT: Overruled.

24 A I've never heard of that organization, but when I did a  
25 search on Google about neuroscience organizations, I got

Thomas, PhD - cross - Barmen

1158

1 3.6 million organizations, although in the United States,  
2 there is only 975,000. So you talk about an organization I  
3 don't know about. And besides, I decided to take the case on  
4 a lien so that the person could get treatment.

5 Q We discussed the American Academy of Neuroscience at your  
6 last deposition. You never told me at that time you didn't  
7 know what it was, correct?

8 A You didn't ask.

9 Q Okay. I asked you in your last deposition what the  
10 American Academy of Neuroscience's position was on -- I'm  
11 sorry, I asked you what the American Academy of Neuroscience  
12 consensus was as to validity testing in the neuropsychological  
13 realm. Do you remember what you said to that?

14 MR. KIEFFER: Objection, improper impeachment.

15 MR. BARMEN: It's a different question. It's not --

16 THE COURT: Sustained.

17 MR. BARMEN: Okay.

18 BY MR. BARMEN:

19 Q In addition to never reviewing Mr. Bauta's medical  
20 records, you didn't ask him what medications he was taking  
21 until you had been treating him for two years, correct?

22 A No, I asked him, I just didn't write it down.

23 Q Do you remember having a discussion with me in one of  
24 your depositions about the potential impact of medication on  
25 qEEG results?

Thomas, PhD - cross - Barmen

1159

1 A Yes.

2 MR. BARMEN: Deposition Number 2, please.

3 THE COURT: Sustained.

4 BY MR. BARMEN:

5 Q Do you remember me asking you in your deposition whether  
6 medication can impact the results of qEEG tests?

7 THE COURT: Sustained.

8 MR. KIEFFER: Objection.

9 THE COURT: Can medication impact the results of  
10 qEEG testing?

11 THE WITNESS: Yes. Mildly so, usually.

12 THE COURT: Okay.

13 BY MR. BARMEN:

14 Q And you never asked Mr. Bauta what medications he was on  
15 until after you had done three of the four qEEG's over a  
16 period of over a year-and-a-half, correct?

17 A Oh, I knew he was on some medication which have he  
18 tapered off, and now as I understand it, he's not on it except  
19 in emergencies. But Bob Thatcher has done studies showing the  
20 qEEG's are still valid. Besides, what I wanted to do is I  
21 wanted to find out the relationships of the different  
22 variables, so I know where to guide my treatment in Mr. Bauta.

23 I don't need to know if there is a slight difference  
24 in magnitude in, you know, excess or deficient variables. The  
25 treatment would still be the same.

SAM

OCR

RMR

CRR

RPR

Thomas, PhD - cross - Barmen

1160

1 Q Did I ask you on April 20th, 2017 why you waited until  
2 February 2nd, 2017 to ask Mr. Bauta what medications he was  
3 taking?

4 MR. KIEFFER: Objection.

5 A I don't recall you asking me that at all.

6 THE COURT: Sustained.

7 A I don't remember everything you said.

8 THE COURT: Sustained.

9 MR. BARMEN: All right. Page 37 of deposition  
10 Number 2, please.

11 MR. KIEFFER: Objection, Your Honor.

12 THE COURT: Let's see first. What line?

13 MR. BARMEN: Page 37, starting at line 14 down to  
14 line 23.

15 A Okay. What's the question?

16 THE COURT: Hold on, hold on.

17 All right. Dr. Thomas, do you know when you first  
18 either asked Mr. Bauta or found out what medications he was  
19 on?

20 THE WITNESS: I probably found out in the first  
21 couple sessions. I may not have written it down. By the way,  
22 it didn't make any difference as far as my treatment goes.

23 MR. BARMEN: Can you pull up depo 1, page 37,  
24 please?

25 MR. KIEFFER: Objection. It's improper impeachment.

Thomas, PhD - cross - Barmen

1161

1 MR. BARMEN: Lines, Your Honor, 4 -- I'm sorry, 5  
2 through 22 in depo 1.

3 Can you blow that up, please, 5 through 22?

4 THE COURT: What is the date? This is February 2nd?

5 MR. BARMEN: This is February 2nd. The first one we  
6 looked at, Your Honor, was April 20th. So it's in both of  
7 them.

8 MR. KIEFFER: Objection, Your Honor, it's not  
9 impeaching if you read lines 10 and 11.

10 MR. BARMEN: Keep going through 22, counsel.

11 THE COURT: Okay. You can ask these questions.

12 MR. BARMEN: Thank you.

13 BY MR. BARMEN:

14 Q When I took your deposition on February 2nd, 2017, I  
15 asked you, starting at line 5, or did I ask you, starting on  
16 line 5 -- do you have it there, Dr. Thomas?

17 A Yes.

18 Q I asked you: If someone is on certain medications, can  
19 that affect the test results? Your answer was: It can. I  
20 then asked you: Do you know what kind of medications  
21 Mr. Bauta is on daily?

22 Your response was: Daily, I don't know. He tries  
23 to avoid them, but he has pain medication.

24 I then asked you: Do you know if he's on any other  
25 kind of medication other than pain medication?

Thomas, PhD - cross - Barmen

1162

1 Your answer was no.

2 I then asked you: You don't know, or no he's not?

3 Your answer was: I don't know.

4 I then asked you: Understanding that certain  
5 medications can impact qEEG testing, wouldn't that be  
6 something you should know?

7 Your response: It might be, but ordinarily,  
8 medications can be understood, and the EEG can be interpreted  
9 correctly.

10 I then asked you: Okay, but to interpret that,  
11 wouldn't you need to correlate it with knowing what  
12 medications a particular patient is taking?

13 Your response was: Possibly.

14 Do you recall that?

15 A Vaguely.

16 Q And we had a similar exchange in April.

17 The point is, you did not ask Mr. Bauta what  
18 medications he was taking until after the third qEEG, despite  
19 admitting that medications can impact qEEG.

20 True or false?

21 A I don't recall.

22 Q Okay. You did a total of four qEEG s on Mr. Bauta,  
23 correct?

24 A Correct.

25 Q You agree you're not an expert in qEEG?

Thomas, PhD - cross - Barmen

1163

1 A Correct.

2 Q In fact, for the first three, you relied who a social  
3 worker by the name of Mr. Smith to help you interpret the  
4 results, fair?

5 A I think so, yeah.

6 Q Okay. And for the fourth one, you relied on a Dr. Herd,  
7 correct?

8 A Correct.

9 Q And Dr. Herd you believe is an expert in qEEG?

10 A Correct. Actually, I would like to clarify something.  
11 Mark Smith is an expert in qEEG. You say social worker as if  
12 that's some kind of disqualification of his credentials. He  
13 happens to be one of the highest-ranking qEEG people in the  
14 country.

15 Q He is not a medical doctor, correct?

16 A No.

17 Q He can't diagnose anyone, correct?

18 A He can diagnose. Social workers can diagnose in this  
19 state.

20 Q Social workers can diagnose brain injury by looking at a  
21 qEEG?

22 A They can diagnose according to DSM V, and brain injury is  
23 part of that. Actually, they can.

24 Q Okay.

25 A That's my understanding.

Thomas, PhD - cross - Barmen

1164

1 Q You understand also that Mark Smith testified that you  
2 cannot --

3 THE COURT: Sustained.

4 BY MR. BARMEN:

5 Q -- use qEEG --

6 THE COURT: Sustained.

7 BY MR. BARMEN:

8 Q By your own admission, three of the four qEEG tests you  
9 did are invalid, correct?

10 A No.

11 Q The first test had a lot of artifact in it, didn't it?

12 A I am not so sure about that. I'm looking at the qEEG's,  
13 you know, recently, and they looked pretty valid to me.

14 Q When you testified back in February of --

15 A By the way, you can still have accurate results and have  
16 artifact. There is an auto edit that can correct it. So  
17 you're trying to push things into a box, and it's  
18 inappropriate.

19 Q I am just going by what you previously testified to,  
20 Doctor.

21 A No, you're trying to put me in a box.

22 Q When did you go back and review these test results again?

23 A Why?

24 Q When?

25 A Last couple weeks.

SAM

OCR

RMR

CRR

RPR

Thomas, PhD - cross - Barmen

1165

1 Q Why?

2 A Because I was coming to visit you.

3 Q Okay, that's fair. Did you not tell me back in  
4 February of 2017 that the first test had a lot of artifact,  
5 which is why you did the second test?

6 MR. KIEFFER: Objection, improper impeachment.

7 THE COURT: Sustained.

8 THE WITNESS: So I don't answer that?

9 THE COURT: Correct.

10 BY MR. BARMEN:

11 Q Let's look at page 46 of your first deposition.

12 MR. KIEFFER: Objection.

13 MR. BARMEN: Can I have a sidebar, please?

14

15 (Continued on the following page.)

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SAM

OCR

RMR

CRR

RPR

Sidebar

1166

1 (The following sidebar held outside of the hearing  
2 of the jury.)

3 THE COURT: Why are you doing this?

4 MR. BARMEN: Because if he is going to keep changing  
5 his testimony, I have to continue to impeach him. He is  
6 changing his testimony. He is. I have to show the jury.

7 THE COURT: What is the point of that? You're  
8 getting very close, and I will let you go, if you want to get  
9 close to the point where you're starting to ask him questions  
10 about qEEG, which you almost just did, about diagnosis, then,  
11 then they are going to call him back on the stand and I am  
12 going to let all of that in.

13 MR. BARMEN: I am not going to diagnose --

14 THE COURT: You almost just did with Mark Smith.

15 MR. BARMEN: I am off Mark Smith. I am talking now  
16 about the specific tests that did he where he admits three of  
17 them is invalid.

18 THE COURT: If you can't see the ridiculousness, and  
19 I'm looking at you as someone who doesn't have the history  
20 that Mr. Barmen has with this person, he is so emotional and  
21 personally involved with this that he will go to the ends of  
22 the earth to prove Dr. Thomas wrong and he is going to jump  
23 the line and boom.

24 MR. MANNION: Can we take the break now for lunch?

25 THE COURT: Yes, I think we should.

Sidebar

1167

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MR. MANNION: Thank you.

2

(Sidebar concluded.)

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(Continued on the following page.)

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Proceedings

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1 THE COURT: Lunch break, ladies and gentleman. Be  
2 back at quarter to 2:00. Thank you.

3 THE WITNESS: So I am not to talk to anybody about  
4 this case?

5 THE COURT: Exactly.

6 THE WITNESS: Mum's the word. How about the  
7 attorneys?

8 THE COURT: Don't talk with them.

9 THE WITNESS: No?

10 THE COURT: No.

11 THE WITNESS: All right.

12 THE COURT: See you folks at quarter to 2:00.

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14 (Lunch recess.)

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Thomas - recross - Barmen

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1 AFTERNOON SESSION

2 (In open court; outside the presence of the jury.)

3 THE COURT: Are we ready?

4 MR. BARMEN: Yes, Your Honor.

5 THE COURT: Dr. Thomas, you can come up.

6 MR. McELFISH: Sorry, Judge, we are ready.

7 (Witness takes stand.)

8 (Jury enters the courtroom.)

9 THE COURT: Please be seated.

10 You may continue, Mr. Barmen.

11 MR. BARMEN: Thank you, Your Honor.

12 RECROSS EXAMINATION

13 BY MR. BARMEN:

14 Q Dr. Thomas, would you agree with me that no matter what  
15 kind of testing you're doing on someone to try and determine a  
16 treatment plan, it is important that the tests be valid?

17 A Yeah.

18 Q Okay. Prior to you treating or taking on Mr. Bauta, you  
19 didn't have any information regarding his pre-injury cognitive  
20 function, did you?

21 A Actually, it's noted in Dr. Honor's report, he had school  
22 records and it looks like he was average.

23 Q What do you consider to be an average student?

24 A Well, I don't have his tables in front of me, but they  
25 were between the 25th and 84th percentile.

Thomas - recross - Barmen

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1 Q 25th?

2 A And 84th percentile or 16th and 84th percentile, rather.

3 Q Did you ever review the school records yourself for Mr.  
4 Bauta?

5 A No.

6 Q There wasn't any neuropsychological testing done prior to  
7 the bus accident for to you review to get an idea of his  
8 baseline; correct?

9 A Not that I know of.

10 Q Let's talk a little bit about the neuropsychological  
11 testing that was done. Prior to you ever treating Mr. Bauta,  
12 he had had a battery of neuropsychological tests from Dr.  
13 Honor and Dr. Morgan, the defense neuropsych expert; correct?

14 A I think Morgan was after I started treatment, but I'm not  
15 sure.

16 Q Okay. And actually, I think timing-wise, you're probably  
17 right, but Dr. Honor had already done his before you treated  
18 him; fair?

19 A Fair.

20 Q And you'd agree with me that Mr. Bauta showed a lack of  
21 full effort, let's say, with the testing done for Dr. Honor?

22 A That would be a proper way of characterizing it.

23 Q Okay. And he also showed a similar lack of full effort  
24 on the test done by Mr. Morgan; true?

25 A Yeah, I think so.

Thomas - recross - Barmen

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1 Q And I think you already testified on direct on the first  
2 set of neurological testing you had done by another neuropsych  
3 in your office by Dr. --

4 A Hoffman.

5 Q -- Dr. Hoffman, again, he showed a similar lack of full  
6 effort, let's say, fair?

7 A Yes.

8 Q So three tests, the initial tests that were done, one by  
9 you, one by Dr. Honor and one by Dr. Morgan, showed similar  
10 results in terms of Mr. Bauta level of effort, fair?

11 A Yes.

12 Q And I know you attribute the effort issues to Mr. Bauta's  
13 pain; true?

14 A More than pain.

15 Q What else?

16 A His fatigue, probably some cognitive problems to some  
17 extent, some brain fog, and he said that when he sat for a  
18 long period of time he would get so uncomfortable it's -- it  
19 gets in the way of his thinking.

20 Q You agree that the results of Dr. Honor's tests were such  
21 that you believe it crossed the line into malingering?

22 A No. I don't think at any time he scored in the  
23 malingering range.

24 MR. BARMEN: Pull up 140 of depo three, please.

25 MR. McELFISH: I'm sorry, depo three?

Thomas - recross - Barmen

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1 MR. BARMEN: Yes, the November --

2 MR. McELFISH: Got it. Page?

3 MR. BARMEN: 140, please. 1 through 17.

4 MR. McELFISH: I'm sorry.

5 Q In your November deposition, did I ask the question well --

6 A I don't see anything by the way.

7 Q Try and tap the screen.

8 A Got it.

9 Q In the November 2017 deposition, did I ask you the  
10 question --

11 MR. KIEFFER: Objection. Improper impeachment.

12 THE COURT: Can I see the next page, please? The  
13 rest of the answer.

14 Sustained.

15 Q You didn't tell me in November that the results of Dr.  
16 Honor's neuropsychological testing crossed the line of  
17 malingering?

18 MR. KIEFFER: Objection.

19 Improper impeachment.

20 THE COURT: I'm having a hard time following this.  
21 Can you show me which exhibit it is in the book so I can read  
22 it?

23 MR. BARMEN: It might be easier this way, Your  
24 Honor.

25 MR. McELFISH: Judge, do you want the reporter?

Thomas - recross - Barmen

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1 MR. BARMEN: It might be easier this way, Your  
2 Honor. Dr. Honors.

3 THE COURT: All right. You can, yes.

4 MR. BARMEN: Thank you, Your Honor.

5 Q Sir, look at page 140 of the deposition from November of  
6 2011, specifically 9 and 10.

7 A November 2011?

8 Q November of 2017.

9 A Oh, okay.

10 Q Right in front of you there, page 140.

11 A Okay.

12 Q At line 9 and 10?

13 A Uh-huh.

14 Q You told me then that the results of Dr. Honor's  
15 neuropsych test crossed the line of malingering; correct?

16 A Well, that's what it says. Was this one of those  
17 deposition transcripts that I never got? Because I would have  
18 challenged that.

19 Q Okay. And that's fine. But the point is --

20 A But I don't even know what it means actually.

21 Q I --

22 A You mean that something in Honor's evaluation indicated  
23 Jose Mr. Bauta was malingering? Is that what you mean?

24 Q No, sir. No. What I'm suggesting, based upon your  
25 testimony, was you reviewed the results of Dr. Honor's

Thomas - recross - Barmen

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1 neuropsychological test and we already agreed it demonstrated  
2 poor effort; right?

3 A Okay.

4 Q And the results were such that it even could have crossed  
5 the line into malingering. That's what you testified back in  
6 November; true?

7 A I'm not sure I did testify to that.

8 Q That's fine. The point is Dr. Honor's neuropsychological  
9 test results were not valid because of the poor effort; fair?

10 A No, that's not true.

11 Q Did you not testify in the same deposition in November  
12 that those test results were not valid?

13 MR. McELFISH: Objection, improper impeachment.

14 THE COURT: Overruled.

15 A Do I answer that one?

16 Q Yes.

17 THE COURT: Yes.

18 A Repeat the question.

19 Q Did you not testify in November of 2017 that the results  
20 of Dr. Honor's neuropsychological testifying were not valid?

21 A I doubt I said that.

22 MR. BARMEN: Can we go to page 141? Can you pull up  
23 the top of 141 with this, please.

24 What I want is lines 1 through 6 of 141.

25 Q Do you agree that when you have results that demonstrate

Thomas - recross - Barmen

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1 this type of poor effort you're not going to get valid  
2 testing?

3 MR. KIEFFER: Objection. It's improper impeachment.

4 A I don't know what you're referring to.

5 Q We are talking about Dr. Honor's --

6 A I don't think you are. I think I need the previous page  
7 to see what you're talking about.

8 MR. BARMEN: Go to 140, the top of the page.

9 Q Look at lines 1 through 6, were we not talking about the  
10 validity test in Dr. Honor's neuropsychological battery?

11 A You might have been talking about that yeah.

12 Q Is that what your deposition transcript indicates there,  
13 sir?

14 A That's what it indicates.

15 Q Okay. Do you agree that when you have the type of poor  
16 effort demonstrated by these tests that you're not going to  
17 have valid test results? That's all I'm asking.

18 A No. You're wrong. You can have valid test results.

19 Q So the valid test results would demonstrate that Mr.  
20 Bauta was malingering?

21 A Boy, you're really twisting this around. No again.

22 Q Do you think Dr. Honor's neuropsychological battery that  
23 demonstrated poor effort was valid, yes or no?

24 A Yes.

25 Q Do you think that Dr. Morgan neuropsychological battery

Thomas - recross - Barmen

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1 that demonstrated poor effort was valid, yes or no?

2 A Probably not.

3 Q Do you think that the first neuropsychological battery  
4 that you did that demonstrated poor effort was valid, yes or  
5 no?

6 A Yes.

7 Q So despite the fact that the three results were  
8 essentially identical, yours is valid, Dr. Honor's is valid,  
9 and Dr. Morgan is invalid?

10 A Yes. Ask me why.

11 Q We will get there. I just want to make sure that we're  
12 all on the same page. That the same test results --

13 A You have the same test results, but they're not even the  
14 same test.

15 Q Okay. When you retested Mr. Bauta as you indicated at my  
16 suggestion, the second set of neurological tests that you did,  
17 you didn't do a full battery, did you?

18 A I did a full battery, Halstead-Reitan Battery.

19 Q That was a four-hour test; right?

20 A Yes.

21 Q But the initial test that Dr. Honor did and the initial  
22 test that Dr. Morgan did were eight-hour tests; true?

23 A Probation.

24 Q And you're critical of Dr. Morgan for not breaking the  
25 test up into two days because of this fatigue issue that you

Thomas - recross - Barmen

1177

1 talked about; right?

2 A Correct.

3 Q Okay. When you're treating someone like Mr. Bauta or  
4 anybody else, you expect them to be honest and forthright with  
5 you, don't you?

6 A Yes.

7 Q And you believe Mr. Bauta was?

8 A Yes.

9 Q Mr. Bauta didn't tell you that Dr. Morgan gave him the  
10 option to do the test over two days, did he?

11 A He didn't tell me -- he said that he was not offered two  
12 days to do the testing. And if he were offered two days to do  
13 the testing, he would have taken it.

14 Q Okay. We will come back to that, but despite the fact  
15 that Dr. Honor did it over two days and Dr. Morgan didn't,  
16 both tests indicated poor effort, we have already establish  
17 that; right?

18 A Correct.

19 Q Okay.

20 MR. BARMEN: Can we pull up, please, that 1120-173  
21 or is that 412-0173.

22 MR. McELFISH: 017?

23 MR. BARMEN: Three. Small screens only.

24 Q This is the consent regarding neuropsychological  
25 evaluation services that Dr. Morgan presented to Mr. Bauta

Thomas - recross - Barmen

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1 prior to the testing. You have seen this before; correct?

2 It was marked as an exhibit in one of your  
3 depositions.

4 A Yeah, but I don't know if I've seen the whole thing,  
5 though.

6 MR. BARMEN: Can we go to 0174, please.

7 Q You will see that Mr. Bauta signed this on February 2,  
8 2016; correct?

9 A That's what it says.

10 Q Okay. Are you suggesting that you didn't see both of  
11 these pages in your deposition?

12 A Well, point me to aspect that you want me to pay  
13 attention to.

14 Q Right now I want you to answer the question that I just  
15 asked you, sir. Is it your position that you didn't see both  
16 pages of these in your deposition?

17 A I suppose I saw them. I don't recall.

18 MR. BARMEN: Go back to the first page, please.

19 Thank you. Can you blowup the bottom where it says risks and  
20 likely benefits, assessment and evaluation.

21 Q You agree that this document that Mr. Bauta signed says  
22 at the bottom if you become so tired that you prefer to finish  
23 on other day, let us know?

24 A I see that.

25 Q And Mr. Bauta did sign this document?

Thomas - recross - Barmen

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1 A He did, but it was -- there's a part of this that has  
2 been forgotten. Jose Bauta can't read and he was not given  
3 this to out loud, as far as I know. I don't know what  
4 happened. But if you go back and look at Steve Honor's scores  
5 on the reading comprehension, Jose Bauta scores at less than  
6 the first percentile on all reading comprehension measures.  
7 So unless this was read to him, he might have just signed it  
8 to be cooperative.

9 I know that's not smart to do in legal situations,  
10 but it is very likely that he did not understand what he was  
11 signing and he's also a cooperative person that he just wants  
12 to finish things and go along with what's required. But he  
13 told me that at the noon break he had to take a pain pill and  
14 he was out of it for the rest of the day. I would, therefore,  
15 consider most of Joel Morgan's testing as not valid.

16 Q You believe your second round of testing was valid;  
17 right?

18 A Yes.

19 Q And he had to read that test to do it, didn't he?

20 A What test?

21 Q The second neuropsychological test that you gave him that  
22 you believe is valid, he had to read it to be able to complete  
23 it; correct?

24 A There's almost no reading in it.

25 Q Okay. Have you read Dr. Morgan's deposition?

Thomas - recross - Barmen

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1 A No.

2 Q When Mr. Bauta was telling you that he had to take a pain  
3 pill on the break, did he tell you that he was verbally told  
4 that he could split the test over two days if he chose to?

5 A He said he was not told.

6 Q Okay. Well, Dr. Honor did split the test.

7 A Yeah, and so did I.

8 Q And there was poor effort shown on both of those, your  
9 initial test anyway?

10 A Initial, and by the way, the second testing, all my  
11 effort test measures were completely valid. He almost scored  
12 perfectly and he was still brain-damaged.

13 Q Let's talk about that for a minute. The second set of  
14 tests you gave, the second neuropsychological battery that you  
15 gave him was after he indicated to you that he had been  
16 informed that we had him under surveillance; true?

17 A I'm not sure when I heard that. In fact, I don't even  
18 know that was really true. I think I recall hearing something  
19 about it, but I don't know when he told me.

20 (Continued on next page.)

21

22

23

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Thomas - cross - Barmen

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1 BY MR. BARMEN: (Continuing.)

2 Q Do you agree with the proposition generally, if someone  
3 is accused of exerting poor effort and then they're given an  
4 opportunity to do something again, they might exert more  
5 effort the second time?

6 A Well, it obviously didn't happen with the first three  
7 neuropsychological evaluations so that would not be true.

8 Q Unless of course they realized they had been under  
9 surveillance?

10 A Nobody was in my office but me. What do you mean by  
11 surveillance?

12 Q I'm not suggesting he was under surveillance in your  
13 office, sir.

14 A Then I don't know what you're talking about.

15 Q Okay. That's fair. Do you agree that for you to really  
16 determine how much treatment Mr. Bauta needs going forward you  
17 would need to do a full battery of neuropsychological testing?

18 A That would be a very good idea, yeah.

19 Q And despite the fact that it would be a good idea and  
20 could benefit him, you haven't done it, true?

21 A No, because he's done an awful lot of testing so far and  
22 I wouldn't put him under that unless -- I don't know. I would  
23 do it if I really could see -- I would probably do it too  
24 because I would treat him no matter what.

25 Q When we talked about it in November of 2017 you agreed

Thomas - cross - Barmen

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1 with me that it could benefit him.

2 A What could benefit him?

3 Q A full battery of testing him.

4 A I'm not sure that even came up with me doing a full  
5 battery. We have plenty of neuropsychological and achievement  
6 measures already and it might be a whole different ball game  
7 after this case.

8 Q Could we look at page 172 of depo three, please, from  
9 November? 11/8/17, page 172.

10 Sir, do you recall me asking you --

11 MR. BARMEN: Can you blow it up starting at line 3,  
12 please? It's a little small for me to see it.

13 Q We were talking about how much treatment you thought  
14 Mr. Bauta was going to need going forward from November of '17  
15 and I asked you this question or did I ask you this question:  
16 "And then what did you -- and then what did you evaluate after  
17 those next 100 visits at \$400 a visit to determine?"

18 Was your answer: "What did you mean, what did I  
19 evaluate?" Did I then ask you: "To determine whether or not  
20 he needs to continue treating with you for another year  
21 because you say two to three years."

22 Did you not then answer: "I would do an evaluation  
23 like you've seen me do before but probably more elaborate."  
24 Did I not then ask: "What evaluation would you do that's more  
25 elaborate?" Did you not answer: "I would give him reading,

Thomas - cross - Barmen

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1 math and memory tests which I didn't do in this evaluation of  
2 the first one because it's already done by Dr. Honor."

3 Did I not then ask you: "But you know now that he  
4 didn't put forth full effort when he was tested by Dr. Morgan?  
5 Leave Dr. Morgan out of it." Did you not then answer:  
6 "Okay," to which I asked you: "You know he didn't put forth  
7 full effort with Honor yet you don't think it's relevant to  
8 see what he could do on those tests when he did put forth full  
9 effort." To which you answered: "You have it in front of you  
10 how he did when he did put forth full effort and he's still  
11 measured as having a brain injury." I then asked: "I don't  
12 have it in front of me. When did the image" -- I'm sorry,  
13 strike that.

14 "I don't have it in front of me when he did the  
15 image or the reading you're talking about because you didn't  
16 give it to him, right?" Your answer: "Correction, I didn't  
17 do that." I then asked you: "Didn't I? You didn't think it  
18 would be a benefit both you and him -- you need to let me  
19 finish, I don't think -- you don't think it would benefit both  
20 you and he, your patient, to see how he would score if he put  
21 forth full effort?" Did you then answer: "It might be  
22 beneficial"?

23 MR. KIEFFER: Objection, improper impeachment.

24 THE COURT: Overruled. Can you answer the question?

25 A I'm trying to figure out what you're getting at here.

Thomas - cross - Barmen

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1 Q I can start over --

2 A Given more testing would be beneficial.

3 Q And you didn't have a reason for not having done it;  
4 correct?

5 A Well, the reason is effort. I want him to be in much  
6 better shape so he can -- we can have some accurate scores  
7 about his achievement tests.

8 Q Okay. Well, then, on page 74, starting at line 7, did I  
9 not ask you: "Again, you agree with me that it's possible you  
10 haven't done it. I don't understand why. Explain it to me."  
11 Did you not answer: "I have no explanation"?

12 A Okay. That's what I answered, I guess.

13 Q That's what it says there; right?

14 A Yeah.

15 Q So you had something you testified could benefit him and  
16 you had no explanation for why you hadn't done it, true?

17 A Well, I can give an explanation now.

18 Q Is what I just said true, yes or no?

19 A I will agree that that's apparently what I said.

20 Q Isn't it true that you believe that doing that testing  
21 could actually demonstrate whether he was capable of ever  
22 going back to work?

23 A No, I don't think so.

24 Q Pull up 173 again, please. Still on 173 starting at line  
25 22, after you agreed it might be beneficial did I not ask you:

Thomas - cross - Barmen

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1 "So why haven't you done it?"

2 THE COURT: I want to see the next page.

3 MR. BARMEN: Will you please pull up lines 1 through  
4 5 on the next page?

5 THE COURT: Sustained. Do not read it.

6 BY MR. BARMEN:

7 Q After your last deposition, did you ever talk to  
8 Mr. Bauta about whether or not it might be beneficial for him  
9 to try to get back in the workforce?

10 MR. KIEFFER: Objection.

11 THE COURT: Sustained.

12 Q Do you agree with me that for someone with a brain injury  
13 and cognitive dysfunction doing something to exercise your  
14 brain could be beneficial to his betterment?

15 A Yes.

16 Q Is it still true that you believe that one of Mr. Bauta's  
17 biggest impediments going forward are his memory issues?

18 A No.

19 Q What changed between November --

20 A By the way, the correct answer is I don't know. I'm not  
21 saying he has or has not memory issues. I just don't know the  
22 assessment of it at the current time.

23 Q Have you done something to test his memory since you  
24 testified in November of 2017?

25 A No.

Thomas - cross - Barmen

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1 Q Are you aware of any treating physicians of Mr. Bauta  
2 other than you questioning his long or short-term memory?

3 A No.

4 Q Do you agree neuropsychologically that theres consensus  
5 that TBI patients reach a plateau and medical maximum  
6 improvement within two years of injury?

7 A Obviously I don't agree because I have improved him quite  
8 beyond that span.

9 Q Okay. And that's based on what you showed earlier on  
10 direct partially?

11 A Well, it's my experience with him every week.

12 Q He's gotten better?

13 A Yes.

14 Q But you still believe he is brain injured?

15 A Oh, yes.

16 Q And part of that belief is based on what you showed  
17 earlier, parts of these qEEGs that you say demonstrate he's  
18 improved from the last first to the last; isn't that --

19 A And my second evaluation and I'm seeing him twice a week,  
20 very often every week, and he has become better in his mood  
21 and better in his conversation. He's still very slow in  
22 walking and experiences a fair amount of pain, but he's  
23 better.

24 Q You agree pain is subjective?

25 A Maybe by current measures, but some -- you know, there

Thomas - cross - Barmen

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1 may be ways in the near future, which I don't know and none of  
2 us know, where we can be mere objective about pain.

3 Q So yes you agree, as of now at least, pain is subjective,  
4 true?

5 A I'm not going to be pushed into a corner about that. I'm  
6 just going to not give an answer.

7 Q I would ask that you answer the question, Doctor.

8 A I don't know. That's the answer.

9 Q Okay. Mr. Bauta never once told you he experienced  
10 radiating pain, did he?

11 A He might have, I don't recall. I would ask where the  
12 pain was and he would say his back, but he may have recorded  
13 radiating pain, I don't recall.

14 MR. BARMEN: Pull up page 33 of depo one, please.

15 MR. McELFISH: Page and line?

16 MR. BARMEN: 33, line 23 on to line one of page 34.

17 A Okay, so that's your question.

18 Q Well, wait for the Judge, please.

19 THE COURT: Okay, fine.

20 MR. KIEFFER: Objection. It's outside the scope of  
21 his treatment.

22 THE COURT: Overruled.

23 Q Sir, on page 33 of your first deposition did I not ask  
24 you starting at line 23: "Okay, has he ever told you that  
25 he's got pain that radiates into his extremities, whether it

Thomas - redirect - Kieffer

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1 be his arms or his legs?" Did you not answer: "He has not  
2 said that to me"?

3 A I see that.

4 Q That was your testimony in February of 2017; correct?

5 A Yeah, I guess so.

6 Q Doctor, you're not aware of any objective evidence of  
7 brain injury to Mr. Bauta in a single medical record of his;  
8 correct?

9 A I haven't reviewed the records, so I don't know.

10 Q As someone who is treating him for a brain injury, don't  
11 you think it would be important to do?

12 A Actually, it doesn't matter. I make my own conclusions  
13 and do my own treatment.

14 Q You really didn't make a conclusion. You determined he  
15 was brain injured before you even met him. We've established  
16 that; right?

17 A That's what you think. I think you're dead wrong. I did  
18 my own tests, for God's sakes, and they're detailed tests in  
19 ten different realms and I made my own conclusions with my own  
20 tests.

21 MR. BARMEN: All right. Doctor. I appreciate your  
22 time. I don't have any other questions for you.

23 REDIRECT EXAMINATION

24 BY MR. KIEFFER:

25 Q Mr. Barmen asked you a question a moment ago about

Thomas - redirect - Kieffer

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1 whether you had a record of Mr. Bauta making complaints to you  
2 of pain that radiated to his extremity. Do you recall that  
3 question?

4 A Yes.

5 Q All right. Now when you first started seeing Mr. Bauta  
6 he had already had spine surgery by that point in time, true?

7 A Actually more than one, but yeah.

8 Q And you knew that. You recorded that in your records in  
9 perhaps I think that first visit with him; correct?

10 A Correct.

11 Q So if Mr. Bauta had made complaints of pain radiating to  
12 his extremity months before, prior to even having spine  
13 surgery, that's not anything you would have been aware of,  
14 true?

15 MR. BARMEN: Objection.

16 THE COURT: Overruled.

17 THE WITNESS: So I don't answer?

18 THE COURT: You can answer.

19 A What was the question again?

20 Q If Mr. Bauta had made complaints of pain radiating to his  
21 extremities, lower extremities, months before he ever saw you  
22 for the first time and before he ever had surgery on his  
23 spine, that's not anything that you would necessarily be aware  
24 of; correct?

25 A Well, yeah -- correct. I was -- I don't remember him

Thomas - redirect - Kieffer

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1 saying that and if I would have heard it, it would have  
2 indicated a probable other kind of pathology. So maybe more  
3 of a pinched nerve in the column that would affect one side  
4 more than another. I don't -- I do not recall ever hearing  
5 about radiating pain. But also you'd have to know exactly  
6 what he meant.

7 Q Sure.

8 A Would it mean one side, both sides, which is very  
9 different than one side? So --

10 Q Fair enough. When you would see Mr. Bauta I take it you  
11 were interested in getting information from him about the  
12 nature of his pain in the here and now, not necessarily  
13 physical pain he had experienced months before?

14 A Correct. And that's exactly what you treat. You treat  
15 the here and now. You don't need to know too much anything  
16 else.

17 Q You treat the patient that's in front of you?

18 A Correct.

19 Q You were giving some responses to Mr. Barman about effort  
20 testing and I want to follow up on one of those issues. Did  
21 you say that Mr. Bauta scored well on the second set of tests,  
22 the Halstead Reitan battery that you gave him, in terms of the  
23 efforts measures?

24 A The effort measure in any neuropsychological battery is  
25 quite a separate test. It's a test unto itself and there are

Thomas - redirect - Kieffer

1191

1 a number of choices that you can have. In fact, it's a bit of  
2 a cottage industry. There are six or seven common ones. The  
3 Halstead Reitan battery is distinct. It doesn't have effort  
4 testing per se except that if the pattern of the test scores  
5 reflects a true TBI patient, traumatic brain injury patient,  
6 on the second evaluation, the Victoria Symptom Validity Test,  
7 VSVT, he scored on all three for the measures almost  
8 perfectly. And yet on the Halstead Reitan battery he still  
9 scored as brain damaged. So the effort was excellent. He was  
10 free of a lot more of the pain and fatigue and I would say  
11 because of my treatment and so it looked like he improved and  
12 he was -- he no longer had this label of imperfect effort or,  
13 you know, less effort and, so, it looks like we have a real  
14 picture.

15 Q And this effort testing that you just referenced goes by  
16 the acronym VSVT?

17 A Yes.

18 Q And the second set of those results was improved and you  
19 attribute that to the benefit from the treatment that you  
20 provided?

21 A Yeah, but I'm sure there are other factors involved,  
22 maybe an improved relationship with his daughters and getting  
23 to be more active in his life and so on.

24 Q Doctor, on this issue of a lien that many questions were  
25 asked on, did you undertake treatment with Mr. Bauta because

Thomas - redirect - Kieffer

1192

1 in your opinion you were the only person who might be willing  
2 to take him on as a patient without necessarily getting paid  
3 and give him some benefit?

4 A Well, that's true, but also I'm probably one of the few  
5 neuropsychologist, in fact the only one I know in New York  
6 City or even the boroughs, who does biofeedback and  
7 biofeedback of the brain. The vast majority of  
8 neuropsychologists only do testing, probably 95 percent, maybe  
9 more and for some reason they just don't look into treatment  
10 models. There is another discipline called Cognitive  
11 Remediation, which I have not done with Mr. Bauta because I  
12 want to get his pain down, I want to get him to sleep on a  
13 regular basis and when that's kind of settled then I think we  
14 can work on some cognitive exercises. There are not that many  
15 people who do that as well, but there might be 20 here in New  
16 York City.

17 Q You took his case on because you thought you might be  
18 able to help him?

19 A Correct.

20 Q And in your opinion you have helped him?

21 A Yes.

22 Q And you took this case on because you believed you might  
23 be able to help him, even though you might not get compensated  
24 for your services?

25 A Yes, and that's okay. I'd be better about it if he feels

Cummings - direct - McElfish

1193

1 better.

2 Q An you're willing to treat him, even if you don't end up  
3 getting paid at least until such time in your professional  
4 judgment he's reached a plateau in his recovery?

5 A Correct.

6 Q Thank you, doctor. Nothing further.

7 MR. BARMEN: No questions.

8 THE COURT: Dr. Thomas, thank you very much. Thank  
9 you, you are excused.

10 (Witness excused.)

11 MR. McELFISH: At this time, Your Honor, the  
12 plaintiff calls life care planner Wendy Cummings.

13 THE COURT: Please raise your right hand.

14 (Witness sworn/affirmed.)

15 THE COURT: Please be seated. Tell the Court  
16 reporter your name and spell it please.

17 THE WITNESS: My name is Wendy Cummings, W-E-N-D-Y  
18 C-U-M-M-I-N-G-S.

19 **WENDY CUMMINGS,**

20 called by the Plaintiff, having been  
21 first duly sworn, was examined and testified  
22 as follows:

23 DIRECT EXAMINATION

24 BY MR. McELFISH:

25 Q Good afternoon, Ms. Cummings.

Cummings - direct - McElfish

1194

1 A Yes.

2 Q You are here by way of subpoena; correct?

3 A Correct.

4 Q My law firm for the plaintiff subpoenaed your appearance  
5 today and you've complied and we thank you.

6 A You're welcome.

7 Q And you recall me, for better or worse, from your  
8 deposition; right?

9 A I do.

10 Q Okay. All right. Now, my recollection of your  
11 background is that you had primarily a psychology background;  
12 is that correct?

13 A Not primarily, but I have a psychology background and I'm  
14 a certified life care planner.

15 Q Understood and somewhere since 2001 or so I believe you  
16 worked with a Ms. Madsen is it?

17 MR. BARMEN: Objection, leading.

18 THE COURT: I'll allow some leading overruled.

19 A Would you repeat that, please.

20 Q Somewhere around I guess 2000, early 2000s you worked  
21 with a Ms. Madsen?

22 A I was working with Jane Madsen at that time, yes.

23 Q She's also a life care planner?

24 A Yes.

25 Q And what percentage of her work is for defense?

Cummings - direct - McElfish

1195

1 A Her work, when I was working for her, was about 70/30  
2 defense/plaintiff.

3 Q And, so, for how many years did you work for Ms. Madsen  
4 who did 70 percent defense work?

5 A I worked for her from 1994 until 2016.

6 Q And during that time, did you prepare life care plans for  
7 her 70 percent to defense?

8 A I'm not sure I understand that question.

9 Q When you worked with her you prepared life care plans;  
10 right?

11 A Yes, I did.

12 THE COURT: Of the life care plans that you  
13 prepared, what percentage were for defendants, what percentage  
14 were for plaintiffs?

15 THE WITNESS: My percentage fluctuated and sometimes  
16 it would be 60/40, sometimes it would be 70/30.

17 THE COURT: In that range?

18 THE WITNESS: In that range, yes.

19 BY MR. McELFISH:

20 Q And when you say -- just to be clear when you say 70/30,  
21 for example, you mean 70 percent in favor of defense, 30  
22 percent for plaintiffs?

23 A Could you rephrase that, please.

24 Q Yeah, in other words, the 70 percent is attached to the  
25 defense and the 30 percent goes to the plaintiff; correct?

Cummings - direct - McElfish

1196

1 A Yes.

2 Q Okay.

3 MR. McELFISH: Small screens, Your Honor.

4 Q Okay. Okay, Ms. Cummings, what I would like you to do is  
5 direct your attention to the small screens in front of you  
6 there. That's a copy of your curriculum vitae, true?

7 A Actually, there's nothing on it. Oh, there it is. Yes,  
8 that is.

9 Q That's a copy of the curriculum vitae that was attached  
10 to your deposition; right?

11 A Right.

12 Q All right. I'd like you just to go over and I --  
13 withdrawn. I went to the second page of that which for the  
14 record is 432-0103. I'd like to look at publications  
15 withdrawn --

16 I'd like to look at Memberships and Professional  
17 Associations, P 32-0303 for ID, okay?

18 A Yes.

19

20 (Continued on the following page.)

21

22

23

24

25

Cummings - direct - McElfish

1197

1 EXAMINATION CONTINUES

2 BY MR. McELFISH:

3 Q All right. Tell the jury the three professional  
4 associations that you were involved in.

5 A The three that are listed on my C.V. are the  
6 International Academy of Rehabilitation Professionals, the  
7 American Psychological Association, and the Connecticut  
8 Psychological Association.

9 Q All right. And the publications are both for psychology,  
10 right?

11 A That is correct.

12 Q So you did not present in the field of lifecare planning  
13 or rehabilitation?

14 A No.

15 Q And the presentations that you've given relate to  
16 psychology, correct?

17 A Correct.

18 Q You did not present as part of your formal education and  
19 training in lifecare planning?

20 A Is that something I already answered? I don't know. Is  
21 that a new question?

22 Q Let me make it a better question.

23 So in your presentations, you also gave psychology  
24 presentations and not lifecare planning?

25 A Correct.

SAM

OCR

RMR

CRR

RPR

Cummings - direct - McElfish

1198

1 Q Except there is one in November of '98 that you appear to  
2 have given to the Medical Interinsurance Exchange in  
3 Princeton, New Jersey, right?

4 A I did that, correct.

5 Q And that was for claims professionals?

6 A That was for doctors and medical professionals, case  
7 managers.

8 Q For insurance companies, right?

9 A Yes, I think so.

10 Q Okay.

11 A It was a while ago.

12 Q Okay. Now, in your current practice, you mostly do your  
13 lifecare plans for defense, correct?

14 A No, not -- not currently.

15 Q At the time of your deposition, I believe it was 70/30.

16 A It was, and it's now just about 50/50.

17 Q Okay. So what I would like to do is, let's take a look  
18 at your report for a minute, and that appears right here  
19 (indicating)?

20 MR. McELFISH: 432-0080 for ID is on the small  
21 screens.

22 BY MR. McELFISH:

23 Q Do you see it?

24 A I see it.

25 Q Is that your report?

Cummings - direct - McElfish

1199

1 A Yes, it.

2 Q So you were retained by the defense law firm in this  
3 case, Marshall, Dennehey, Warner, Coleman and Goggin, right?

4 A Yes.

5 Q And you authored a report dated October 13th of 2016 to  
6 Mr. Harold Moroknek, right here (indicating)?

7 A Yes.

8 Q Had you worked for Mr. Moroknek before?

9 A No.

10 Q You had worked for Lewis Brisbois before, correct?

11 A Yes.

12 Q The other law firm representing the defendant in this  
13 case?

14 A Yes.

15 Q How many times?

16 A Twice.

17 Q Okay. Now, in your report, you -- and in doing the work  
18 for the defense law firm in this case, you -- leading up to  
19 your deposition, you basically went and take a look through  
20 all the medical records, right?

21 A Right.

22 Q And to try to save some time, Ms. Cummings, you went  
23 through all the hospital records and you went through all the  
24 treating doctors' records, and even some of the experts'  
25 reports; true?

SAM

OCR

RMR

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RPR

Cummings - direct - McElfish

1200

1 A Yes.

2 Q All right. You were provided by the defense attorneys in  
3 this case the expert reports of a neurologist, Dr. Aaron  
4 Rabin, right?

5 A Yes.

6 Q And a Dr. Andrew Casden?

7 A Yes.

8 Q He's an orthopedic spine specialist for the defense,  
9 right?

10 A Yes.

11 Q Did you review the radiological opinions of James  
12 Provenzale, the radiologist that the defense hired in the  
13 case?

14 A I did not.

15 Q And I do believe you reviewed the opinions of a Dr. Joel  
16 Morgan, who is a neuropsychologist for the defense in this  
17 case?

18 A Yes.

19 Q And as a result of reviewing their expert -- withdrawn.

20 Do you know who Dr. Fardad Mobin is?

21 A Yes.

22 Q You did not review his deposition in this case, correct?

23 A I've reviewed it, yes.

24 Q Well, since your deposition, you may have reviewed it,  
25 right?

Cummings - direct - McElfish

1201

1 A Correct.

2 Q You didn't review it back when you were deposed in -- a  
3 year ago?

4 A That's correct.

5 Q And even at that time, you had not seen Dr. Mobin's  
6 reports, true?

7 A I had seen his reports.

8 Q Now, were you compensated for your time here today?

9 A Yes.

10 Q And who paid you?

11 A Well, I will be compensated; I'm sorry.

12 Q Who is going to pay you?

13 A Marshall Dennehey.

14 Q And how much are they going to pay you?

15 A For today?

16 Q Uh-hum.

17 A \$3,500.

18 Q Okay. And since you have been retained in this case  
19 prior to October of 2016, how much -- how much have you billed  
20 them for your services?

21 A Approximately 24,000.

22 Q And that was for the review of the medical records and  
23 the correspondence back and forth, as well as a meeting that  
24 you had with Mr. Bauta, correct?

25 A It was for review of records and evaluation of Mr. Bauta,

Cummings - direct - McElfish

1202

1 yes.

2 Q Now, you got a chance to meet with Mr. Bauta and sit down  
3 with him and discuss this case with him, right?

4 A To discuss his complaints, yes.

5 Q Okay. And I believe I'm correct, and you'll -- please  
6 feel free to let me know if I'm not right, that you did that  
7 after you reviewed all the medical records?

8 A Not all of them.

9 Q Are you able to say here, though, in front of the jury  
10 which ones you had reviewed before seeing Mr. Bauta, and those  
11 that you had not?

12 A No.

13 Q Okay. Are you able to say whether or not prior to  
14 sitting down with Mr. Bauta, you reviewed more than half the  
15 records or less?

16 A I can't really, you know, quantify it in that way. I can  
17 say that I knew what his complaints were from the records I  
18 had reviewed.

19 Q And where did you have a meeting with Mr. Bauta?

20 A At Marshall Dennehey's office in lower Manhattan.

21 Q Down on Pine Street?

22 A Right.

23 Q So were there any of the defense attorneys at the  
24 meeting?

25 A No.

SAM

OCR

RMR

CRR

RPR

Cummings - direct - McElfish

1203

1 Q How long was the meeting you had with Mr. Bauta?

2 A It was about an hour.

3 Q One-on-one?

4 A Yes.

5 Q Did he arrive in a cane -- with a cane?

6 A He had a cane with him, yes.

7 Q Okay. And what was the general nature of the discussion  
8 between you and Mr. Bauta?

9 A The discussion was about what his complaints are, what he  
10 felt limited in doing due to those complaints.

11 Q And what do you remember about it?

12 A I remember that he said that he had back pain and  
13 stiffness that made it difficult for him to walk, and that's  
14 why he carried a cane with him. And he had neck pain that  
15 made it difficult for him to move his head up and down and  
16 sideways.

17 Q Now, according to my notes, and if there's something that  
18 you need to refresh your recollection, we can pull it up;  
19 there is no problem with that.

20 According to my notes, you had this meeting with  
21 Mr. Bauta in January of 2016. Does that sound right?

22 A Yes.

23 Q And to your understanding, was that about six or seven  
24 months or so after he had had or undergone double-level back  
25 fusion?

SAM

OCR

RMR

CRR

RPR

Cummings - direct - McElfish

1204

1 A Yes.

2 Q Okay. So at the time that you were interviewing him, he  
3 had already undergone the surgery, and so he was in a  
4 post-surgical state, if you will?

5 A Yes.

6 Q What else, if anything, over that hour did you and  
7 Mr. Bauta talk about?

8 A We talked about a typical day for him.

9 Q Let's stop there. And if you don't mind, we'll go  
10 through each one.

11 What did he tell you about a typical day?

12 A He told me that on a typical day, he wakes up at 12:30  
13 p.m., and then sits in bed for a couple of hours more because  
14 he feels pain and stiffness in his low back.

15 Q Now, as part of the \$24,000 that you were paid to review  
16 the medical records, Ms. Cummings, have you seen any evidence  
17 to the contrary of how long it takes him to get ready?

18 A I'm not sure I understand the question.

19 Q I'm not sure I do. I apologize. Let me try that again.

20 In the medical records anywhere that you reviewed  
21 and that you were paid for, did you see any evidence that  
22 contradicted what he told you about how long it took him to  
23 get dressed?

24 A Well, the records spoke to his complaints, but they  
25 didn't quantify or qualify his activities of daily living and

SAM

OCR

RMR

CRR

RPR

Cummings - direct - McElfish

1205

1 the difficulty he reported with them.

2 Q Okay. You didn't see in Dr. Winn's records and in  
3 Dr. Cordiale's records his restriction of motion and his  
4 restrictions on daily living?

5 MR. BARMEN: Objection.

6 THE COURT: Overruled.

7 A I saw that their records that talked about his diagnoses  
8 that they had put forth and the complaints that he had of  
9 stiffness and pain, but it didn't speak to the typical day  
10 scenario, as I was speaking about.

11 Q Okay, other than the length of time it would take him to  
12 get dressed and get ready and things of that nature, what else  
13 did you ask him about?

14 A I asked him about what equipment he uses. I asked him  
15 about what medication he's on. And I asked him to describe  
16 for me his complaints, and how they affected his life at that  
17 time.

18 Q Okay, if you don't mind stopping there.

19 And it's a lot of information, so if you need your  
20 report, I can put it up on the screen to refresh your  
21 recollection.

22 What did he say about equipment? What equipment was  
23 he needing at that time?

24 A He had a cane, and that was -- and he had a spinal cord  
25 bone growth stimulator because he was post-surgery.

Cummings - direct - McElfish

1206

1 Q And do you know for how long he had to use that?

2 A He had used that for several months before I saw him. I  
3 don't know how long he used it for afterwards.

4 Q You've evaluated other people with spine surgery,  
5 Ms. Cummings?

6 A Yes.

7 Q Is a spinal stimulator something that's consistent with  
8 what you've seen in other patients?

9 A I -- I want to correct. It wasn't a spinal stimulator,  
10 like a spinal cord stimulator. It was something to promote  
11 bone growth for healing after the surgery.

12 Q Let me then -- let me correct then the question, because  
13 your answer -- you are correct, I need to ask a better  
14 question.

15 Was the equipment -- a bone growth stimulator, in  
16 your experience in the other patients you've seen, is  
17 typically used for fusions, where the bone is fused?

18 MR. BARMEN: Objection.

19 THE COURT: Overruled.

20 A I think that's a medical question. No, I haven't --

21 Q No problem, okay. All right.

22 And on the medications, what was it he had let you  
23 know he was taking?

24 A He was taking Tizanidine, which is a muscle relaxant.

25 And at times, he was taking Ibuprofen.

Cummings - direct - McElfish

1207

1 Q Does Tizanidine, to your knowledge, if you know, make you  
2 tired?

3 A I don't know.

4 Q Other than equipment and medication, there was one more  
5 category you just testified to a minute ago that you inquired  
6 on, and I didn't write it down.

7 Can you remind me? There was something right after  
8 medication?

9 Let me ask it this way:

10 Other than equipment and medication, what else did  
11 you discuss with him at that visit?

12 A The typical day, and how his subjective complaints play  
13 out in his life.

14 Q Were you able to get an understanding from him,  
15 Ms. Cummings, at that time, as to where he was having pain?

16 A Yes, he indicated in his low back area.

17 Q Okay. And I think you also mentioned that he mentioned  
18 his neck?

19 A And his neck.

20 Q And did he discuss emotional issues with you --  
21 particularly given that you're a psychologist, did he discuss  
22 emotional issues with you from the accident?

23 A Not in any depth. He said that he felt that -- that was  
24 part of his complaint, was that he felt that he was having a  
25 difficult time adjusting to his limitations.

SAM

OCR

RMR

CRR

RPR

Cummings - direct - McElfish

1208

1 Q And being that you have a psychology background, did you  
2 inquire further as to cognitive issues and emotional issues?

3 A I did not inquire further. Cognitive is not my field.

4 Q Fair. Did you inquire into psychological issues and  
5 emotional issues?

6 A I inquired as to whether he was receiving treatment at  
7 that time.

8 Q And what was your understanding, Ms. Cummings, as to  
9 whether he was or was not at that time?

10 A He said that he was not receiving psychological treatment  
11 at that time.

12 Q And have you since reviewed the records of Dr. James  
13 Thomas?

14 A Yes.

15 Q And to your understanding, he was treating at that time?

16 MR. BARMEN: Objection.

17 THE COURT: Overruled. Do you know?

18 A At what time are you referring to?

19 Q In or around January of '16, when you were visiting with  
20 him.

21 A I'd have to look at Dr. Thomas's records again to confirm  
22 that or not.

23 Q Okay. We have covered the equipment, medication,  
24 difficulty in daily living.

25 Before we go on, with respect to the difficulty of

Cummings - direct - McElfish

1209

1 daily living, did you get any more specific with him after he  
2 began to discuss with you how long it takes to get dressed,  
3 for instance? Did you discuss other kinds of difficulties  
4 with daily living?

5 A Yes.

6 Q Please tell the jury about it.

7 A Yes. He described that he had -- waking up at 12:30, the  
8 staying in bed for two hours because of pain and stiffness in  
9 the low back. And he described that he would take a shower  
10 after those two hours and then, perhaps -- or actually more  
11 often than not go back to bed after the shower.

12 Q And to your recollection, does he say why?

13 A He said because of pain and stiffness in his low back.

14 Q Anything else he described to you in that meeting about  
15 his difficulties with daily living, that comes to mind?

16 A Just give me a moment to think.

17 (Pause.)

18 A He said that he was independent with activities of daily  
19 living, and they took long -- a long time for him to do them.

20 Q Anything else about difficulties with daily living? I  
21 want to make sure I cover what you covered with Mr. Bauta  
22 before I move on.

23 Anything else?

24 A I think that's it.

25 Q Okay. And other than activities with daily living,

Cummings - direct - McElfish

1210

1 equipment, medication and the other items we've discussed,  
2 what else did you discuss with Mr. Bauta during that hour?

3 A I think that covers it.

4 Q All right. And did you take notes during that meeting?

5 A I did.

6 Q And I would assume, and correct me if I'm wrong, you took  
7 the notes and made them into your report for Mr. Moroknek?

8 A Yes, I synthesized them into my report.

9 Q And did you have any discussions with either Mr. Moroknek  
10 or Mr. Saal or Mr. Barmen or any of the attorneys for the  
11 defense in this case?

12 A Pardon, yes.

13 Q And what did you tell them?

14 A I'm not clear on that question.

15 Q Okay. Did you have discussions with them, for instance,  
16 about the meeting you had with Mr. Bauta in January of '16?

17 A Yes.

18 Q And what did you tell them?

19 A I told them, basically, what I just told you.

20 Q Okay. Did you let them know that you were going to make  
21 recommendations as to future lifecare for Mr. Bauta?

22 A Well, I was asked to make a lifecare plan for him,  
23 assuming that everything in the records and in my interview of  
24 him was true, and do a worst-case scenario so they could have  
25 an idea of what numbers they would be looking at going

Cummings - direct - McElfish

1211

1 forward.

2 MR. McELFISH: Your Honor, may I have that answer  
3 read back?

4 THE COURT: Yes.

5 (Record read)

6 BY MR. McELFISH:

7 Q Okay. And how many of those conversations have you had  
8 with the attorneys for the defense? It doesn't matter to me  
9 who you spoke to, which one of them. How many of those  
10 conversations did you have with them?

11 MR. BARMEN: Objection. What point in time?

12 THE COURT: It is a good point.

13 MR. McELFISH: All right.

14 BY MR. McELFISH:

15 Q Let's focus it in on just, for instance, the meeting in  
16 of January of 2016 or thereabouts, in that area.

17 How many conversations did you have with  
18 Mr. Moroknek or the attorneys for the defense about your  
19 opinions?

20 A I had more than one, but I don't have a count of how many  
21 times.

22 Q And are you able to say for the jury what was discussed  
23 in the conversations, other than what you've already said?

24 A That is what was discussed.

25 Q All right. And ultimately -- withdrawn.

Cummings - direct - McElfish

1212

1           What was the scope of your retention? What were you  
2 asked to do in the beginning, before you did anything?

3     A     I was asked to do a lifecare plan that was objective and  
4 reasonable and assumed the worst-case scenario, and put  
5 numbers to the future costs of items arising from that  
6 worst-case scenario.

7     Q     Now, in your report -- you say nowhere in your report  
8 that is a worst-case scenario, do you?

9     A     I don't say that in my report, no.

10    Q     So if it were a worst-case scenario and you meant that,  
11 you would want to document that; would you not?

12           MR. BARMEN: Objection.

13           THE COURT: Overruled.

14           You can answer the question.

15    A     I would not document that.

16    Q     Okay. Well, you didn't create any other lifecare plans  
17 or any other reports for something less than a worst-case  
18 scenario?

19    A     No, I did not.

20    Q     Did you verbally discuss your opinions with the attorneys  
21 before you issued the report?

22    A     Yes.

23    Q     And did they ask you to change or alter your opinion in  
24 any way based on that discussion?

25    A     No.

Cummings - direct - McElfish

1213

1 MR. McELFISH: So here is what we are going to do  
2 now, we will go -- for the Court, small screens -- counsel, we  
3 will go to 432-96.

4 MR. BARMEN: Could you give me a page number of the  
5 report, counsel, because I am looking at a different Bates  
6 number.

7 MR. McELFISH: Sure. It's 432-96 in the exhibits  
8 and on the report, it's 17 of 21.

9 MR. BARMEN: Thank you.

10 MR. McELFISH: You're welcome.

11 BY MR. McELFISH:

12 Q Now, before I get to this exhibit, Ms. Cummings, you read  
13 all the records, except for Dr. Mobin's deposition?

14 MR. BARMEN: Objection.

15 Q And you met with Mr. Bauta --

16 THE COURT: Overruled.

17 Q You met with Mr. Bauta. Did you do anything else within  
18 the scope of your retention before you put pen to paper and  
19 typed up your report?

20 A I reviewed the records. I evaluated Mr. Bauta. And I  
21 worked up the items that would be based on his subjective  
22 complaints, and then put all that in my report.

23 Q When you -- when you were formulating your opinion as to  
24 what the lifecare needs were going to be, did you consider  
25 such things in the reports of the treating doctors, such as

Cummings - direct - McElfish

1214

1 objective testing?

2 A I'm not sure what you mean.

3 Q It's a little vague, but for instance, objective testing  
4 by the chiropractors might be straight leg tests, or the  
5 Braggard's test, or other kinds of tests that revealed various  
6 medical issues --

7 MR. BARMEN: Objection.

8 Q -- Did you consider those?

9 THE COURT: Sustained.

10 BY MR. McELFISH:

11 Q Have you spoken to the attorneys for the defense in the  
12 past week about your testimony?

13 A Yes.

14 Q Have they provided you with daily transcripts of the  
15 witnesses that have appeared and testified here before the  
16 jury, such as Dr. McGowan?

17 A No.

18 Q Dr. Winn?

19 A No.

20 Q Dr. Russo?

21 A No.

22 Q Dr. Goldman?

23 A No.

24 Q Did you ask for those daily transcripts?

25 A No.

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1 Q I would make the assumption that prior to preparing your  
2 report, you also did some research as to the pricing for the  
3 items you are going to put into your lifecare plan?

4 A Yes.

5 Q And I believe you used some fee book; I don't -- is it  
6 Optum, was it Optum that you used?

7 A No.

8 Q What did you use?

9 A I didn't use a book, I used a program: Physicians Fee  
10 Reference.

11 Q Is that a software program?

12 A Yes.

13 Q Have you heard of FairHealth.org?

14 A Yes.

15 Q Is that a reliable database, in your view?

16 A Yes.

17 Q Is there any reason why you chose to use the Physicians  
18 Fee software as opposed to FairHealth.org?

19 A I used the Physicians Fee Reference because  
20 FairHealth.org was not available to me at that time.

21 Q Because it requires a private license?

22 A No, it just wasn't -- it wasn't spoken of within my  
23 professional groups, and so I was actually not aware of it.

24 Q But now you are aware that FairHealth.org is a national  
25 database for billing, coding and pricing?

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1 A Yes.

2 Q And you also understand that FairHealth.org requires a  
3 private license in order to be able to access the information?

4 MR. BARMEN: Objection.

5 THE COURT: Overruled.

6 A I am really not clear on if it's a private license. I do  
7 know that I purchased the ability to use that program.

8 Q You have purchased the ability to use FairHealth?

9 A Yes.

10 Q When did you do that?

11 A I did that in -- I'm not sure when I did that, but it was  
12 after I wrote this lifecare plan.

13 Q Okay. You said earlier that you had not reviewed  
14 Dr. Mobin's deposition at the time of your report, but you  
15 have since reviewed it before your trial testimony; is that  
16 what you said, or did I mishear that?

17 A That's what I said.

18 Q Did you see in Dr. Mobin's deposition that the pricing he  
19 used for the future care was based on FairHealth.org?

20 A I saw that he uses that. It seemed to me that he uses it  
21 in his practice, because I don't think he put forth projected  
22 numbers.

23 Q But he indicated in his testimony that's the database he  
24 relies upon?

25 MR. BARMEN: Objection.

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1 THE COURT: Overruled.

2 A For his office billing, yes.

3 Q I'm sorry I missed the date, Ms. Cummings. When did you  
4 begin using FairHealth?

5 A I didn't give you a date because I don't recall.

6 Q I apologize. Can you give us a ballpark?

7 A Well, as I said, it was after I wrote this report,  
8 somewhere between there and now. I'd say I've been using it  
9 over a year.

10 Q Okay. And since beginning to use FairHealth.org, did you  
11 go back at any point and reassess the numbers that you have in  
12 this case based on that database?

13 A No.

14 Q Do you still use this Physicians Fee software, or do you  
15 exclusively use FairHealth.org now?

16 A I use FairHealth.org now.

17 Q Okay. Let's go to 432-0096 for ID for Mr. Barmen, at 17  
18 of 21.

19 It's on the small screens, Ms. Cummings.

20 A I see it.

21 Q You came up with a lifecare plan for Mr. Bauta, correct?

22 A Correct.

23 Q And you broke it down in a couple of different areas, the  
24 first of which was what's referred to as one-time costs?

25 A Yes. (Continued on the following page.)

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1 DIRECT EXAMINATION

2 BY MR. McELFISH: (Continuing)

3 Q Okay. And then if we go to the next page, which is 0097  
4 for ID, we have what's referred to as annual costs.

5 A My page hadn't flipped, but, yes.

6 Q Apologize. How's that?

7 A Yes.

8 Q Explain the difference to the jury, please.

9 A The one-time costs are costs that will be used over the  
10 short term, within the first year or two, and they're not  
11 going to be repeating year after year throughout the life  
12 expectancy as are the annual costs.

13 Q Okay. So one is a one-time shot and the other repeats  
14 over the years?

15 A Yes.

16 Q When you say over the years, you picked a life expectancy  
17 over how many years it would occur; right?

18 A I didn't pick one. I just used the national statistics  
19 to get that information.

20 Q And what was the ballpark of the life expectancy over  
21 which the annual cost would project?

22 A 38 years.

23 Q Okay. Now, before I get to the specifics of the exhibit,  
24 I just want to go back and ask you, you told Mr. Barmen that  
25 if you believed what you -- I'm sorry, not Mr. Barmen. You

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1 told Mr. Moroknek that if what you read in the report was true  
2 and if what you heard from Mr. Bauta was true, you would rely  
3 upon that information to prepare the life care plan?

4 A To prepare a worst-case scenario life care plan assuming  
5 everything was true.

6 Q Assuming everything was true, okay. And based on  
7 assuming everything was true, that is what you prepared, these  
8 two exhibits?

9 A The annual costs and the one-time costs?

10 Q Yes.

11 A Yes.

12 Q Now, with respect to the physical therapy, which  
13 according to your report is a one-time cost, how many sessions  
14 did you think he needed?

15 A From the records, I understood that he had been having  
16 treatment and I observed and I calculated how many he had  
17 historically and I came up with a number of 50 sessions  
18 because it -- over the years he had had more than 50 sessions  
19 and he had not been -- let me just think about this. And he  
20 -- and I didn't know -- I didn't have up to date records from  
21 PT Dr. Vasile to have his projections going forward, so I had  
22 to use my best judgment based on what I learned from the  
23 records.

24 Q Okay. But to be clear, Ms. Cummings, if you did not feel  
25 as a life care planner based upon the records and meeting Mr.

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1 Bauta that he did not need any physical therapy, you would not  
2 have prepared it in your plan or included it?

3 A Well, I have to say I relied on the doctors and Mr.  
4 Bauta's subjective complaints to the doctors and to me. I  
5 didn't, you know, decide on my own he needs physical therapy  
6 because that's a medical question.

7 Q Fair, but that would then presume there was no doctor  
8 that said he needed none?

9 MR. BARMEN: Objection.

10 MR. McELFISH: Let me withdraw that. It was a  
11 little awkward.

12 Q If you reviewed records, Ms. Cummings, that said that Mr.  
13 Bauta did not need future therapy, you would not have put it  
14 in your plan?

15 MR. BARMEN: Objection.

16 THE COURT: If you had seen records, medical records  
17 that said he did not need physical therapy, would you have put  
18 physical therapy in your plan?

19 THE WITNESS: You're asking me?

20 THE COURT: Yes.

21 THE WITNESS: I would not -- I base my opinions on  
22 the entirety of the record, and if there were one record that  
23 said he didn't need physical therapy, I would not rely only on  
24 that record and not give him physical therapy because my task  
25 was to do a worst-case scenario based on his complaints --

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1 Q Okay.

2 THE WITNESS: -- assuming they're true.

3 Q I mean, you had cases where the worst-case scenario was  
4 zero, right? No therapy, no future need?

5 A That's kind of a broad question and I don't think I can  
6 answer that sitting here.

7 Q Let me try to rephrase it. Have you had other cases  
8 where you have been asked to do a life care plan, you have  
9 attributed zero future care?

10 A Zero future care?

11 Q Yes.

12 A In what context?

13 Q In context of litigation where you have been hired by the  
14 defendants to say this is what his future care needs are and  
15 you found zero.

16 A I'm really at a lose to understand that question, I'm  
17 sorry.

18 Q Okay. Well, if you read records and you interviewed  
19 somebody who you were on the other side of the litigation and  
20 based upon the entirety of the records you didn't think they  
21 needed, for example, future physical therapy, you would not  
22 have included it? Is that true?

23 A I can't give a hypothetical because I've had so many  
24 cases and there's not something I can say I typically do or  
25 don't do. I have to take each case as it's presented to me.

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1 Q Okay. Anyway, based on the entirety of the records, 50  
2 sessions of physical therapy going forward and how much money  
3 did you attribute -- or what was the cost -- I should probably  
4 say what was the cost of the physical therapy per session per  
5 session?

6 A Do you mind flipping back to the --

7 Q No, I don't mind at all.

8 A 136 per session.

9 Q What is the total amount of physical therapy that you  
10 believe Mr. Bauta needs?

11 A The cost for those 50 sessions is, it looks like \$6,800.

12 Q That's a little small. I can make it bigger.

13 A Bigger might help.

14 Q The number again, please.

15 MR. BARMEN: Objection, Your Honor, she is reading  
16 the report.

17 THE COURT: I will allow it. Well, do you see the  
18 report on the screen?

19 THE WITNESS: I do. I just have a little difficulty  
20 because it's blurry.

21 Q Let me ask it this way: Ms. Cummings, you have authored  
22 a report. You have an opinion. Have you memorized each  
23 number?

24 A No.

25 Q So you're going to need the report to know what it is

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1 that you recommended --

2 A Yes.

3 Q -- to at least accurately recall the number numbers?

4 A To give you accurately the numbers, I will need to refer  
5 to this.

6 Q There were objections and different things going on, can  
7 you please tell me the physical therapy number again?

8 A The total number?

9 Q Yes, ma'am.

10 A \$6,800.

11 Q Okay. And then moving down the list, and this is just on  
12 the one-time costs category, you have an opinion as to whether  
13 or not Mr. Bauta need psychotherapy?

14 MR. BARMEN: Objection.

15 THE COURT: Overruled.

16 MR. BARMEN: Can we approach, Your Honor?

17 THE COURT: Sure.

18 (Sidebar held outside the hearing of the jury.)

19 (Continued on the following page.)

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Sidebar

1224

1 (The following sidebar held outside of the hearing  
2 of the jury.)

3 MR. BARMEN: He is asking a non-medical witness to  
4 give opinions based on medical needs. She was here to review  
5 records and to do costs and he is asking her a medical  
6 opinion. She has already said once, you know, that she can't  
7 give a medical opinion. He could ask her what does X cost in  
8 your report. He should not be permitted to ask is it your  
9 opinion that he needs X from a medical standpoint, which is  
10 what he intends to do.

11 MR. McELFISH: Well, that's a misunderstanding of  
12 how a life care plan works. What a life-care planner does is,  
13 using their background and experience, as she just said, she --

14 THE COURT: That's exactly wrong. Your economist  
15 didn't do that. Your economist didn't say this line in Mr.  
16 Provder's life care plan cost X. Mr. Provder put the cost and  
17 then she just extrapolated the cost out taking into account  
18 inflation and present value.

19 MR. McELFISH: I am confused.

20 THE COURT: I can't help you with that. That's your  
21 confusion.

22 Your life-care planner --

23 MR. McELFISH: You already heard her --

24 THE COURT: Stop with the ridiculous arguments.  
25 Okay. You say things off the cuff that are demonstrably false

Sidebar

1225

1 by your own doctors. Your life-care planner Mr. Provder says  
2 physical therapy is going to cost X, yes or no.

3 MR. McELFISH: Well --

4 THE COURT: Answer the question. Yes or no, that's  
5 what your life-care planner said?

6 MR. McELFISH: Well, I don't remember. I'm trying  
7 to think of how to deal with this.

8 THE COURT: Listen, you're objecting in part to your  
9 own life care planner's --

10 MR. BARMEN: No, no.

11 MR. MANNION: Can I, Your Honor? The way that he's  
12 asking the question, he's asking if it's her opinion that he  
13 needs all of these things. That's a medical opinion. What  
14 she did is look through the records and say these doctors say  
15 he needs those things and I will take the worst-case scenario,  
16 here's the cost for those things. It's not her opinion that  
17 he needs them. That's a medical opinion. That's the  
18 difference in the way he is asking.

19 THE COURT: It is just the form of the question?

20 MR. MANNION: Exactly.

21 He is asking her essentially for a medical opinion  
22 as to what this gentleman needed. That's not what she did.  
23 She took the worst-case scenario medical opinions and said  
24 okay, the doctor says he needs this, now let me put a cost to  
25 it.

Sidebar

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1 THE COURT: Can you read back to me the question  
2 that prompted this sidebar?

3 (Record read.)

4 THE COURT: They are right.

5 MR. McELFISH: What I am trying to ascertain is,  
6 because I don't necessarily disagree, how they want it  
7 phrased. Because she did come to an opinion based on the  
8 records about what the doctor said that he needed. I'm okay  
9 with... I'm okay with how we rephrase it. I don't care about  
10 that part.

11 MR. MANNION: It's not her opinion on psychotherapy,  
12 it's here the cost is if you believe that doctor.

13 MR. McELFISH: She does have an opinion that he  
14 needs psychotherapy. See, Judge --

15 THE COURT: I saw it on the screen.

16 MR. McELFISH: How about this: Do you have an  
17 opinion based on the doctor's records or have you put together  
18 some life care items based on the doctor's opinions as to  
19 whether or not he will need psychotherapy?

20 MR. MANNION: She can't -- that's the whole thing.

21 THE COURT: Look, it --

22 MR. MANNION: It's the cost.

23 THE COURT: It is not only the cost.

24 MR. McELFISH: Thank you.

25 THE COURT: Mr. McElfish is right to a certain

Sidebar

1227

1 extent. Are there medical records that say he needs 50  
2 sessions of physical therapy?

3 MR. BARMEN: No. What she's done is she has gone  
4 back and look at how much he has already had.

5 THE COURT: Good point. It is her, based on the  
6 records, this is what he needs going forward.

7 MR. BARMEN: No. This is reasonable to give him  
8 based on what he has already had and what you see in the  
9 medical records, not that it is her opinion, but she's giving  
10 him the benefit of the doubt.

11 MR. MANNION: She can't prescribe physical therapy.  
12 She's not qualified to say anything about physical therapy.

13 THE COURT: What about psychotherapy?

14 MR. MANNION: It's the same thing.

15 MR. BARMEN: Also, I object to hearing this part  
16 because he talks about psychotherapy and Dr. Thomas as if it's  
17 one and the same and he conflates the issue with the jury and  
18 he has done it again.

19 Dr. Thomas is not doing psychotherapy, but he asked  
20 the question to her as if he is.

21 THE COURT: Why don't you just ask her, you have  
22 here psychotherapy 50 sessions, how did you conclude that.

23 MR. McELFISH: She's going to say -- before we leave  
24 sidebar so we don't have another sidebar, what she's going to  
25 say is that I looked at all the records and that's what I came

Sidebar

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1 up with based on the totality of all the records.

2 THE COURT: That's fine. And then what costs do you  
3 associate with that.

4 MR. McELFISH: I was just trying to cut to the  
5 chase. Sure. No problem.

6 MR. MANNION: Thank you.

7 (Sidebar concluded.)

8 (Continued on the following page.)

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1 MR. McELFISH: Can I proceed?

2 THE COURT: Yes.

3 DIRECT EXAMINATION

4 BY MR. McELFISH:

5 Q Ms. Cummings, going back to 432-0096 for ID, do you see  
6 there in the record it indicates the need for psychotherapy,  
7 how did you come up with that?

8 A I came up with that based on the records, the treatment  
9 records and Mr. Bauta's complaints in the records of emotional  
10 distress.

11 Q Okay. Now, did you yourself rely upon any of your own  
12 experience, training, and background in order to decide what  
13 it is he needs or did you just rely upon what the doctors and  
14 the therapists had said?

15 MR. BARMEN: Objection.

16 MR. McELFISH: Foundation, Judge.

17 THE COURT: Overruled.

18 A Okay, so I relied on the history and the medical records  
19 and what Mr. Bauta explained to me. I wasn't asked to do a  
20 psychological evaluation.

21 Q That's fair. And based on that, how many sessions of  
22 psychotherapy do you believe Mr. Bauta needs going forward?

23 MR. BARMEN: Objection.

24 THE COURT: How many sessions did you include in  
25 your life care plan?

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1 THE WITNESS: I included 50 sessions of  
2 psychotherapy.

3 Q And how much -- are those -- withdrawn.

4 Did you price out the sessions based on the  
5 physician's fee software?

6 A Yes.

7 Q And how much total is the psychotherapy for the 50  
8 sessions?

9 A \$8,600.

10 Q Okay. What is the next line down?

11 A The next line down is --

12 Q And let me help you out. Let me help you out. Let's do  
13 this.

14 A This is helpful. Thank you.

15 Q You're quite welcome.

16 A It's allowance for diagnostic imaging, such as MRI and  
17 X-rays.

18 Q Now, what I want to do here is ask you, do you have any  
19 type of a breakdown as to how many you included in your life  
20 care plan and, for instance, you have in parenthesis MRIs,  
21 X-rays. How many MRIs? How many X-rays?

22 A I did not break it down that way.

23 Q So where did you come up with the figure, the total cost  
24 for that if you did not know the breakdown?

25 A Well, I reviewed the records and saw his history of MRI

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1 and X-rays and I provided enough funding for X-rays several  
2 times and MRI a time or two, but I didn't break it down.

3 THE COURT: So you got those costs from the  
4 physician's --

5 THE WITNESS: Yes, the fee reference.

6 THE COURT: -- fee reference?

7 THE WITNESS: Yes.

8 Q Tell the jury how much you have -- withdrawn.

9 What is your allowance for future diagnostic testing  
10 for Mr. Bauta?

11 A \$15,000.

12 Q So, in total, can you tell the jury how much the one-time  
13 cost is that you believe he needs?

14 A The one-time cost totals \$30,400.

15 Q Thank you.

16 Let's go on then to the annual costs, which, as  
17 we've already discussed, will repeat annually. Let's begin  
18 with physical therapy. Is this different than the one-time  
19 cost physical therapy?

20 A Yes, it is. This is an annual cost that involves  
21 monitoring of his home exercise program and his status as far  
22 as his need for the home exercise program and making sure that  
23 he is carrying it out in a way that's helpful to him.

24 Q I see. And how many times a year did you believe Mr.  
25 Bauta needed based on the records that you reviewed -- let me

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1 withdraw it.

2 What did you include in your life care plan based on  
3 the records that you reviewed in terms of evaluations?

4 A Four times per year.

5 Q And what is the cost per evaluation?

6 A \$174.

7 Q And the total for the therapy?

8 A Annual is \$696.

9 Q The next section is medical. Can you explain?

10 A Yes. This is based on the medical records and I included  
11 a physiatrist twice per year, \$225 each; a spine specialist  
12 five times per year, \$225 each; and an orthopedist once per  
13 year, \$146 per year.

14 Q Let me understand, physiatrist is sort of a pain  
15 management-type doctor to your understanding?

16 A He is a physical medicine and rehabilitation doctor.

17 Q Thank you. You believe, or you included, I should say,  
18 physiatry visits twice a year for his life?

19 A Yes.

20 Q Who said he needed that?

21 A Well, that would be adjunctive to physical therapy  
22 evaluations every year.

23 Q Okay. Same question on spine specialist, you believe he  
24 needs to see -- I'm sorry. Let me withdraw that. I have to  
25 phrase it right.

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1           You included five visits to a spine specialist a  
2 year for the next 38 years?

3     A     I did.

4     Q     And you also included an orthopedist, who is more of like  
5 a bone doctor, could be spine doctor as well, once a year?

6     A     Yes.

7     Q     For the rest of his life?

8     A     Yes.

9     Q     Now, rather than wasting time going through the  
10 individual numbers, if you could just tell us what the annual  
11 medical costs associated with seeing the rehabilitation  
12 doctor, the spine specialist, and the orthopedist are each  
13 year?

14    A     The total is \$1,721.

15    Q     And I take it those are generally, according to this fee  
16 reference software, that would fall under some sort of an  
17 office visit?

18    A     Yes.

19    Q     By the way, do you know who -- do you know who has  
20 published or -- withdrawn.

21           Do you know where the data comes from or where the  
22 data pool was collected from in the physician reference  
23 software?

24    A     I don't know exactly at this point.

25    Q     At any time did you ever understand it was a collection

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1 of data from an insurance company, health insurance company?

2 A It was a collection of actual charges that were  
3 historically -- were made historically.

4 Q Was that United Healthcare, if you know?

5 A No.

6 Q All right. Let's go on. The next category is  
7 medication. Would you tell the jury what you included in your  
8 life care plan for medication?

9 A I included the two medications that Mr. Bauta informed me  
10 that he was taking when I evaluated him in January of 2016 and  
11 those are Tizanidine, which is a muscle relaxant, and  
12 ibuprofen, which is a non-steroidal anti-inflammatory  
13 medication, which would be more for pain.

14 Q Do you know whether or not he has taken or takes any pain  
15 medication, narcotic pain medication?

16 A What's the timeframe on that?

17 Q Any time after the surgery or during the time that he saw  
18 you.

19 A He was not taking narcotic pain medication when I saw  
20 him.

21 Q Do you know if he has been prescribed pain medications or  
22 narcotic medications?

23 A Yes. During the acute postsurgery period.

24 Q And how about before surgery?

25 A I don't recall.

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1 Q Fair. Okay. When you say medications on an annual  
2 basis, are you able to say for the jury how much medication he  
3 is going to have to take a year?

4 MR. BARMEN: Objection.

5 THE COURT: Are you asking me to give the dosage  
6 that's listed here?

7 Q I'm not asking you for the dosage. I'm asking you for  
8 the frequency. How often would he have to take these  
9 medications?

10 A Well, the Tizanidine has been prescribed at once per day  
11 and he has indicated to me that the ibuprofen was as needed or  
12 intermittently.

13 Q And did I ask you the amount?

14 A The total annual amount is \$296.

15 Q Thank you. Let's go to the next area. Tell the jury  
16 what equipment you believe Mr. Bauta will need for the rest of  
17 his life.

18 A I included a shower chair, a handheld shower, a back  
19 brush, grab bars for the bathroom, a soft lumbosacral  
20 orthosis, which is a back brace that's made of fabric, and a  
21 cane.

22 Q And how much are each of these items?

23 A The shower chair is \$125. The handheld shower is \$40.  
24 The back brush is \$15. The grab bars for the bathroom would  
25 be \$100. A soft lumbosacral orthosis would be \$30, and the

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1 cane would be \$15.

2 Q What's the total annual cost, because you don't get a new  
3 cane every year, for example, so you sort of annualized it  
4 out?

5 A Well, I have a cane replaced every five years and, you  
6 know, I have timeframes for each item.

7 Q How much do you believe the cost is for the annualization  
8 of the equipment per year?

9 A The cost in my report is \$79 per year.

10 Q And that's for 38 years; right?

11 A Correct.

12 Q Now, before I go on, you and I had discussed Mr. Bauta's  
13 cane in your deposition. Did you review your deposition  
14 before today?

15 A Yes.

16 Q And I asked you whether or not his cane was needed.  
17 What's your answer to that?

18 MR. BARMEN: Objection.

19 MR. McELFISH: Let me withdraw it and ask it  
20 correctly.

21 Q Do you have an opinion, Ms. Cummings, as to whether or  
22 not he needs this cane?

23 MR. BARMEN: Objection.

24 THE COURT: Overruled.

25 Do you?

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1 A I don't have an opinion on that. I have the fact that he  
2 carries a cane with him and has for several years and so I put  
3 it into the projected annual costs.

4 Q Okay. Going to your deposition.

5 MR. McELFISH: For counsel and the Court and the  
6 witness, page 33, which is marked as 432-0034. It is on the  
7 small screens.

8 Q You were deposed back in February 3, 2017; correct?

9 A Correct.

10 Q Okay. Beginning at line 7, down to line 17.

11 MR. McELFISH: And I will, Your Honor, bring it up.  
12 Not like that. Sorry.

13 THE COURT: Okay.

14 Q You were asked the following questions and you gave the  
15 following answers:

16 "QUESTION: And you don't have any opinion one way  
17 or the other about whether or not he need the cane?

18 "ANSWER: Well, I do have an opinion that he needs  
19 the cane. I have that in my life care plan. That's one of  
20 the needs that I was able to glean from my records.

21 "QUESTION: So based upon the records and based upon  
22 your personal observations of Mr. Bauta, it is your  
23 professional opinion that Mr. Bauta does need the cane?

24 "ANSWER: Yes."

25 Are those the questions and answers that you were

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1 asked and the answers that you gave in your deposition?

2 A Yes.

3 Q Thank you.

4 MR. McELFISH: Judge, have we had a break? I don't  
5 remember. I just lost -- my iPad went down. I can get it  
6 back up in a second.

7 THE COURT: Take a break or keep piling through?

8 THE JURORS: Break.

9 THE COURT: All right. 10-minute break.

10 (Jury exits the courtroom.)

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Cummings - direct - McElfish

1239

1 (In open court.)

2 (JUDGE RAMON E. REYES enters the courtroom.)

3 (The following occurs outside the presence of the  
4 jury.)

5 MR. McELFISH: Judge, is she getting the jury?

6 THE COURT: Yes. What's up?

7 MR. McELFISH: I found in the transcript she uses  
8 her own experience in respect do physical therapy and  
9 physiatry and I'm going to impeach her with that or at least  
10 ask about it. It's contrary to what counsel said at the  
11 sidebar. She doesn't use any of her own experience to make  
12 any of these recommendations but she specifically testified to  
13 those two.

14 THE COURT: So do it.

15 (Jury enters.)

16 THE COURT: You may continue.

17 BY MR. McELFISH:

18 Q I just want to go back and clear one thing up,  
19 Ms. Cummings, with respect to the manner in which you formed  
20 your opinions. As a life care planner you rely on the records  
21 of others for the most part; is that right?

22 A Yes.

23 Q Okay. But I believe with respect to physical therapy,  
24 you use your own training and experience to come up with the  
25 physical therapy projections?

Cummings - direct - McElfish

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1 MR. BARMEN: Objection.

2 THE COURT: Overruled.

3 A I don't, no. I use my judgment as far as understanding  
4 the treatment that had been received.

5 Q Page four -- Exhibit 432-0057, that's page 56 of the  
6 deposition, lines 3 through 12.

7 THE COURT: Hold on just one second.

8 MR. McELFISH: I can pull it up. It's on your  
9 screen, Judge. I made it bigger.

10 MR. BARMEN: Improper impeachment.

11 THE COURT: This is talking about something  
12 different. Would you come to sidebar, please.

13 (Sidebar held outside of the hearing of the jury.)

14 (Continued on next page.)

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Sidebar

1241

1 (The following sidebar took place outside the  
2 hearing of the jury.)

3 THE COURT: May I see the life care plan?

4 You have been questioning her about these things.

5 MR. McELFISH: Correct.

6 THE COURT: For impeachment what you were going to  
7 do is annual costs which are not the one-time costs.

8 MR. McELFISH: Right.

9 THE COURT: A different thing.

10 MR. McELFISH: I understand. We're over here now.

11 THE COURT: She testified that anything about this  
12 was based on just a review of the records.

13 MR. McELFISH: Yeah. That's my recollection. I'm  
14 afraid to say it.

15 MR. BARMEN: She said she uses her judgment based on  
16 X, Y and Z in conjunction with the medical records.

17 MR. McELFISH: The whole reason we were up here  
18 before --

19 THE COURT: That is not my recollection of what she  
20 said when you asked her about the physical therapy because all  
21 of this has to do with physical therapy, right? They were in  
22 relation to the one-time costs, how did you come up with the  
23 \$6,800 for physical therapy.

24 MR. McELFISH: Initially, yes.

25 THE COURT: I don't remember any questions on this

Sidebar

1242

1 unless I'm mistaken. Am I mistaken?

2 MR. BARMEN: I don't think so.

3 THE COURT: That specific impeachment is this --

4 MR. BARMEN: I did object to improper impeachment.  
5 I did for that reason.

6 THE COURT: I did not think it was this, but this  
7 says --

8 MR. BARMEN: Either way I think it's inconsistent  
9 with respect to the rest of the annual costs that are not  
10 one-time costs.

11 MR. McELFISH: Yeah, these.

12 THE COURT: Yes, but I don't think she gave how she  
13 came up with this.

14 MR. McELFISH: I'm not trying to beat her up.

15 THE COURT: If she says that's based on what is in  
16 the records, then this is impeachment.

17 MR. McELFISH: I agree with you, I just thought --

18 MR. BARMEN: But she already testified that based on  
19 her judgment X, Y and Z she's answered the question to this  
20 and then he proceeded to impeach on it.

21 MR. McELFISH: She said I used my judgment but she  
22 uses her experience with the discharge of actual patients.

23 MR. BARMEN: She said my judgment in conjunction  
24 with.

25 THE COURT: Fine. You can do it. We're spending

Sidebar

1243

1 time on such ridiculously minor points, but go ahead.

2 (Sidebar ends.)

3 (Continued on next page.)

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Cummings - direct - McElfish

1244

1 BY MR. McELFISH:

2 Q And in your deposition, Ms. Cummings, you were asked the  
3 following questions and you gave the following answers, page  
4 56, lines 3 through 12:

5 "Question: Okay, now with respect to the" --

6 MR. BARMEN: Objection, Your Honor. Didn't we just  
7 discuss this.

8 THE COURT: Lay the foundation for it.

9 Q With respect to the physical therapy evaluations that you  
10 do once a year, where do you obtain that information from?

11 A Well, as I explained earlier, it's four times per year  
12 and it is for follow-up to ensure that he's carrying out his  
13 home exercise program as he should be and he's getting the  
14 benefits from it that are expected.

15 Q Okay, but do you base that upon your own experience or  
16 just what's in the records?

17 A This I used my own judgment and it is based on the -- on  
18 cases that I've seen that are discharged with a home exercise  
19 program and follow-up is recommended.

20 Q All right, thank you. All right, let's go back to where  
21 we were on 432-0097. I believe we were at the assistance area  
22 and let me make it bigger for you. I think we completed  
23 equipment; correct?

24 A We did.

25 Q Okay. Thank you. If we can just go to the assistance

Cummings - direct - McElfish

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1 area, can you explain what that is to the jury, please?

2 A Yes. The assistance -- I have funds for ten hours per  
3 week of homemaker services and the purpose of that is based on  
4 Mr. Bauta's subjective report that he takes longer to do his  
5 activities of daily living and that he spends a good portion  
6 of his day in bed more often than not. So I gave him ten  
7 hours of basically household assistance to do the items that  
8 he didn't have time to do because he was in bed or he didn't  
9 feel capable of doing.

10 Q Okay. I want to just be clear though on the homemaker.  
11 It's ten hours a week at \$15 an hour; right?

12 A Right.

13 Q And that's ten hours a week at \$15 an hour for the rest  
14 of his life?

15 A Yes.

16 Q If you would please tell the jury when you put it  
17 together on an annual cost basis, what did it add up to as an  
18 annual cost?

19 A \$10,592.

20 Q Okay. Going over to P-432-0098 for identification,  
21 Ms. Cummings, you did a summary of costs based on the one-time  
22 cost and the annual costs. Which is the total cost; correct?

23 A Correct.

24 Q Okay. And if you add the one-time cost -- actually,  
25 let's do it this way. The one-time cost you've already said

Cummings - direct - McElfish

1246

1 is 30,400?

2 A Yes.

3 Q And I apologize. Let me make it bigger. Thanks. If you  
4 take the annual cost of \$10,592 that we just established, how  
5 much is that if you just do a flat multiplication projection  
6 out 38 years?

7 A 4,000 --

8 Q I'm sorry?

9 A \$402,496.

10 Q And if you take the annual cost and the one-time cost and  
11 you add them together, what's the total cost for Mr. Bauta's  
12 life care?

13 A Based on my evaluation of him and the records I have in  
14 my report \$432,896 and that's if assuming that everything that  
15 I was told and read was true, if those things aren't true then  
16 I would remove the non-necessary items from my plan.

17 Q Right, but since you were deposed -- withdrawn. Since  
18 you wrote this report a year and a half ago you haven't  
19 removed anything, have you?

20 A I haven't had new records to review.

21 Q Okay. So as of right now in front of the jury you  
22 haven't removed anything?

23 A I haven't removed anything because I didn't have new  
24 information to base that on.

25 Q Okay. But Ms. Cummings, I mean there's law firms

Cummings - direct - McElfish

1247

1 representing the defendant's there. You're retained by them,  
2 you've been speaking to them, you're in communication with  
3 them. You could call and ask them, right?

4 MR. BARMEN: Objection.

5 THE COURT: Sustained.

6 Q You've worked with these law firms before. If you have  
7 an understanding that if they had new records to update you  
8 with, they would have provided them to you?

9 MR. BARMEN: Objection.

10 THE COURT: Sustained.

11 Were you asked to update your report?

12 THE WITNESS: No.

13 Q Now, we can agree that Dr. Mobin in his expert report and  
14 his deposition has opined that Mr. Bauta needs future lumbar  
15 surgery. Do you recall that?

16 MR. BARMEN: Objection.

17 THE COURT: Overruled.

18 A Do I recall that Dr. Mobin says that he needs future -- I  
19 actually don't have that in my mind right now.

20 Q In fact, at your deposition I asked you if you had seen  
21 Dr. Mobin's recommendation for future surgery and you said  
22 along the lines, I would like to have seen that, I would like  
23 to have known that.

24 MR. BARMEN: Objection.

25 THE COURT: Do you recall that?

Cummings - direct - McElfish

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1 THE WITNESS: I think it was referring to his  
2 deposition testimony.

3 Q Yes.

4 A Yes.

5 Q Okay. Had you been provided with his deposition  
6 testimony where he opines on future back surgery?

7 A Yes.

8 Q Okay. So now that you had that in mind, do you believe  
9 that you should add items to your life care plan that includes  
10 surgical features?

11 MR. BARMEN: Objection.

12 THE COURT: Overruled.

13 A That would require a medical opinion and I relied on  
14 Mr. Bauta's self-report and the treating records. And my  
15 understanding is that Dr. Mobin did not see him so I don't  
16 know how valid his opinions are because it's not for me to say  
17 because I'm not a medical doctor.

18 Q In your answer just now you said that you would need a  
19 medical opinion in order to know whether or not he needs  
20 future surgery. So now you have Dr. Mobin's medical opinion.  
21 Do you believe he needs future care with a surgical feature?

22 MR. BARMEN: Objection.

23 THE COURT: Overruled.

24 A I mean, I would need more of a doctor's opinion, such as  
25 treating physicians, physicians who have actually worked with

Cummings - direct - McElfish

1249

1 him.

2 Q You know Dr. Mobin, he's a renowned neurosurgeon, he's  
3 read all the records and he's read the treating doctors and he  
4 has an opinion as to what Mr. Bauta needs for future care,  
5 you're aware of that?

6 MR. BARMEN: Objection.

7 THE COURT: Sustained.

8 MR. BARMEN: Strike.

9 THE COURT: Sustained.

10 Q So when you talk about the worst-case scenario that you  
11 told the jury that's not in your report, that's primarily  
12 based about defense expert reporting, right?

13 MR. BARMEN: Objection.

14 THE COURT: Overruled.

15 A I didn't quite catch the end of that, can you say it  
16 again, please.

17 Q When you talk about the worst-case scenario that you've  
18 prepared, you've only relied primarily on the defense expert  
19 reporting in preparing that worst-case scenario, right?

20 MR. BARMEN: Objection.

21 THE COURT: Overruled.

22 A No, if I were to rely on the defense expert reports there  
23 would be nothing in my life care plan.

24 Q But if you relied on Dr. Mobin, there would be a surgical  
25 feature in there, right?

Cummings - direct - McElfish

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1 MR. BARMEN: Objection.

2 THE COURT: Overruled.

3 A Similarly, as I said, I would need more than the opinion  
4 of a doctor who has not treated him and certainly who has not  
5 seen him and I'm not a medical doctor to sort out the opinions  
6 and come to a conclusion myself. I would need treaters to  
7 have concurred with that or recommended the same.

8 Q Have you reviewed Dr. Cordiale's trial testimony through  
9 daily transcripts?

10 A No.

11 Q He testified last Monday?

12 A No.

13 Q So you have no idea what he has to say about that?

14 A Right.

15 MR. BARMEN: Objection.

16 THE COURT: Overruled.

17 Q Now, on a cost-by-cost basis are you able to say whether  
18 or not FairHealth.org numbers are higher than the Physician  
19 Fee reference numbers on an apples-to-apples basis?

20 THE COURT: At the time you did your report.

21 Q Yes.

22 A I rally can't say that because I didn't have access to  
23 FairHealth at the time and FairHealth is updated very  
24 frequently so it's kind of not an apples-to-apples situation.

25 Q Well, that's fair. If you assume hypothetically that

Cummings - direct - McElfish

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1 plaintiff's medical expert Dr. Mobin has relied upon  
2 FairHealth.org for his projections, that's the same database  
3 you now use?

4 A My understanding is that Dr. Mobin uses it for his office  
5 billing and I can agree that it is a well-thought of and  
6 frequently used program in my profession also.

7 Q Okay. So if he uses it in his office billing for his  
8 practice it wouldn't be a large stretch if he used it to  
9 project future care; correct?

10 MR. BARMEN: Objection.

11 THE COURT: Overruled.

12 A Future care or future cost?

13 Q The cost for the future care, my apologies.

14 A It wasn't aware that he gave cost projections.

15 Q Okay. Now Mr. Provder, a word against him, you have  
16 cases against him?

17 A Yes.

18 Q A lot of them?

19 A Yes.

20 Q Now Mr. Provder, you understand his methodology of  
21 pricing is he actually calls a whole range of doctors and  
22 facilities in the area. Do you understand that?

23 A I've been told that, yes.

24 Q And you understand from his deposition and from your  
25 experience with him that he literally makes a sheet, a check

Cummings - direct - McElfish

1252

1 sheet, and goes out and calls facilities and doctor's offices  
2 and hospitals to find the pricing for each item, do you  
3 understand that?

4 A I've been told that. I don't know that from my  
5 experience with him hand I haven't seen such a -- pardon me --  
6 a sheet from these phone calls.

7 Q Do you have any reason to dispute it?

8 A I don't have any reason to dispute it.

9 Q Okay.

10 A But it is not the most efficient and effective way to get  
11 costs.

12 Q It may not be the most efficient or effective, but  
13 certainly if you make a phone call to a facility and they tell  
14 you it's going to be \$100, it's a pretty good chance it's  
15 going to be \$100?

16 MR. BARMEN: Objection.

17 THE COURT: Overruled. You can answer.

18 A I don't agree with that because with something like the  
19 Physicians Fee Reference and FairHealth you are using CPT  
20 codes which are the Common Procedural Terminology codes that  
21 doctors base their billing on and other medical professionals  
22 also and I think that the idea of calling up a place and  
23 saying how much would you charge for what-have-you, would end  
24 up in a very inexact number because there would be no codes  
25 that were associated with it. And when I first started as a

Cummings - direct - McElfish

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1 life care planner I made a few calls and it was very difficult  
2 to get information that way because they needed codes and I  
3 did not have a vehicle to provide me with those codes.

4 Q Okay. So is that a no, you do not dispute that  
5 Mr. Provder actually does that, because that was the question?

6 MR. BARMEN: Objection.

7 THE COURT: Sustained.

8 Q Let me reask it. Withdrawn. You have nothing to dispute  
9 that that is his methodology in obtaining costs?

10 A I understand that that's what he said, but, you know, the  
11 voracity of that, I have no idea.

12 Q Right, you have no idea and you were not provided with  
13 his trial transcript from in front of this jury just last  
14 Friday.

15 MR. BARMEN: Objection.

16 THE COURT: Sustained.

17 MR. BARMEN: Your Honor, sidebar, please.

18 THE COURT: No, we don't need it. Sustained.

19 MR. McELFISH: I have no further questions.

20 MR. BARMEN: Can we get clarification of whether  
21 there's separation of witnesses or not?

22 THE COURT: No, no.

23 Q One more thing. Thank you, Ms. Cummings. Appreciate it.

24 A You are welcome.

25 (Continued on the following page.)

Cummings - cross - Barmen

1254

1 CROSS-EXAMINATION

2 BY MR. BARMEN:

3 Q Ms. Cummings, how are you?

4 A I'm fine, thanks. How are you?

5 Q Great. Nice to see you again.

6 A Thank you.

7 Q You didn't get a chance to introduce yourself to the  
8 jury. Would you do that, please?

9 A Certainly. I'm Wendy Cummings. I'm a certified lifecare  
10 planner.

11 Q And would you tell the jury a little bit about your  
12 education, training and background, please?

13 A Yes. I obtained my Bachelor's degree in English from  
14 Yale University in 1994. And around the same time, I started  
15 to work as an assistant to a certified lifecare planner. And  
16 after I got the Bachelor's degree, I moved into the field of  
17 psychology and obtained a Master's Degree. And the Master's  
18 Degree in psychology, which is a health-related field, enabled  
19 me to do the coursework and the testing that ended up in my  
20 certification as a lifecare planner.

21 Q And how long have you been certified as a lifecare  
22 planner?

23 A I've been certified since 2001, so 17 years.

24 Q And in that 17 years, about how many lifecare plans have  
25 you completed?

SAM

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Cummings - cross - Barmen

1255

1 A I have completed hundreds. And --

2 Q And -- I'm sorry.

3 A -- I can't estimate better than that.

4 Q Have you done them both for plaintiff and for defendant?

5 A Yes.

6 Q Do you typically take on cases for either side that calls  
7 you?

8 A Yes.

9 Q And when you're going to do a lifecare plan, whether it  
10 be for a plaintiff or a defendant, overall, what are you  
11 trying to accomplish?

12 A I am trying to -- pardon me. I am trying to understand  
13 what the treatment has been, what the current status is, and  
14 based on that, the items that are reasonable to include going  
15 forward.

16 Q Okay. Do you take into consideration in doing that plan  
17 whether you're doing it for a plaintiff or defendant? And by  
18 that I mean, are you trying to make the most expensive plan  
19 you can make or the least expensive plan you can make?

20 A I am trying to make an objective plan that's based on the  
21 facts, and I don't lean toward either side that the attorney  
22 that hired me is on.

23 Q Have you testified in courts regarding your lifecare  
24 plans before?

25 A Yes.

SAM

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RPR

Cummings - cross - Barmen

1256

1 Q Both state and federal court?

2 A Not federal.

3 Q This is your first time in federal court?

4 A Yes.

5 Q Okay. Mr. McElfish already talked about your membership  
6 in professional associations and your publications and your  
7 presentations.

8 MR. BARMEN: So in order to save time at this time,  
9 the defense would tender Ms. Cummings as an expert in lifecare  
10 planning.

11 MR. McELFISH: No objection.

12 THE COURT: Ms. Cummings is received as an expert in  
13 lifecare planning.

14 MR. BARMEN: Okay.

15 THE COURT: Your first time in federal court.

16 THE WITNESS: Thank you.

17 MR. BARMEN: Everybody has got to have a first time.

18 BY MR. BARMEN:

19 Q Okay. Ms. Cummings, what were you asked to do in this  
20 case?

21 A I was asked to do an objective lifecare plan based on a  
22 worst-case scenario, and by that I mean that everything that's  
23 in the treating records is true, and what Mr. Bauta told me is  
24 true, regardless of where his complaints came from.

25 Q Okay. Do you form opinions as to the necessity of

Cummings - cross - Barmen

1257

1 certain medical procedures?

2 A Independently?

3 Q Yes.

4 A No.

5 Q And why is that?

6 A Because it's outside the scope of my practice.

7 Q Do you form an opinion on whether or not in this case  
8 Mr. Bauta is being honest with you when he gives you a  
9 subjective history?

10 A No, I assumed that what he told me was true.

11 Q I thought -- I took you to mean when you were answering  
12 Mr. McElfish's questions, you tell me if I'm wrong, that you  
13 typically don't put a lot of stock in either side's retained  
14 experts.

15 Is that true?

16 A I put less stock in those than in the treating records,  
17 yes.

18 Q And tell the jury why that is, please.

19 A Well, the expert doctors have a different job from mine.  
20 They are doing their evaluation, making diagnoses, and making  
21 recommendations. My task is to synthesize the information and  
22 write an objective lifecare plan. So for me to rely on any  
23 particular witness, expert witness, or a set of them, would be  
24 outside of the scope of my practice.

25 Q Okay.

Cummings - cross - Barmen

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1 A I would be making a medical decision.

2 Q Do you feel like you have a sufficient picture, in terms  
3 of the medical records you reviewed, to prepare your plan?

4 A Yes. Including seeing Mr. Bauta; yes.

5 Q Okay. And in reviewing the records of Mr. Bauta's  
6 treating physicians, did you notice any type of pattern, or  
7 anything strike you as unusual?

8 MR. McELFISH: Foundation, for not a doctor, not a  
9 doctor.

10 THE COURT: I'll sustain the objection.

11 MR. BARMEN: I'll rephrase.

12 BY MR. BARMEN:

13 Q And, again, I'm not talking in terms of the treatment,  
14 but in reviewing the records, did you notice where his  
15 treating doctors were primarily?

16 MR. McELFISH: Objection, foundation and relevance,  
17 and vague.

18 THE COURT: Sustained.

19 BY MR. BARMEN:

20 Q Are you familiar with a rehabilitation center at  
21 110 West 34th Street?

22 A Yes.

23 Q Did you notice that many of Mr. Bauta's treatments came  
24 from the same address?

25 A Yes.

Cummings - cross - Barmen

1259

1 Q Is that something you've typically seen in the past?

2 MR. McELFISH: Foundation.

3 THE COURT: Overruled.

4 A No, no. Typically, there are various treaters, and  
5 they're not in any way affiliated or in the same practice.

6 Q And is that something you noticed in the course of  
7 reviewing records and preparing your plan?

8 A Yes.

9 Q Okay. Despite that, though, you didn't put any more or  
10 less stock in the information contained in the records, did  
11 you?

12 A Based -- despite the fact that they were all in the same  
13 building?

14 Q Yes, ma'am.

15 A No, I did not.

16 Q Okay. When you met with Mr. Bauta -- well, strike that.

17 In typical fashion when you meet with someone for  
18 whom you are preparing a plan, how much overall weight do you  
19 put in their subjective complaints?

20 A I put a lot of weight on their subjective complaints,  
21 because that is what I am basing my future projections on.

22 After I review the medical records, the next step is  
23 to hear from the plaintiff what ongoing complaints remain, and  
24 that gives me a sense of what to put in my lifecare plan.

25 Q Okay. When you met Mr. Bauta, how did he present to you?

SAM

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Cummings - cross - Barmen

1260

1 A He presented as -- well, he -- he had a cane with him.  
2 He was already seated when I arrived, and he presented as  
3 someone who was in a lot of pain and having a lot of  
4 limitations of activities that he was able to do.

5 Q Was Mr. Bauta alone when you met him?

6 A Yes.

7 Q Did he give you any specifics about what he could not do?

8 A Well, he actually said that he can do his activities of  
9 daily living and he can do his laundry, but it takes a long  
10 time for him to do those.

11 And he said, as I've said a couple of times already,  
12 that he spent -- he was spending most of his days in bed.

13 Q Would you agree with me that the home care allowance you  
14 have put into your plan is the biggest ticket item of all?

15 A Yes.

16 Q Is there anything other than Mr. Bauta's subjective  
17 history to you that prompted you to include that in the plan?

18 A The records that I reviewed had various iterations of  
19 those complaints. So I relied on the records, as well as his  
20 self-description when I sat with him.

21 Q And are you talking about, in terms of the medical  
22 records, his history provided to those individual providers?

23 A Yes. His subjective report to the doctors.

24 Q Okay. So his history provided to the medical treaters,  
25 and in addition to the history provided to you, form the basis

Cummings - cross - Barmen

1261

1 for including the home care in the plan?

2 A Yes.

3 Q Okay, we are going to come back to that. You've  
4 obviously seen Mr. Provder's plan?

5 A Yes.

6 Q And the jury has already heard that certainly, you don't  
7 both agree on everything, correct?

8 A Correct.

9 Q How did plaintiff -- strike that.

10 What was the cost Mr. Provder included per hour for  
11 home care in his plan?

12 A If I remember correctly, it was \$22 per hour.

13 Q And do you know where that came from?

14 A An agency.

15 Q What type of agency?

16 A Home health agency, like a nursing agency.

17 Q Okay. Your cost per hour in your plan is \$15 an hour?

18 A Yes.

19 Q Where are you getting that from?

20 A I'm getting that from the Bureau of Labor Statistics. I  
21 have a program that synthesizes that information and it gives  
22 the mean hourly wage, and I use that for my projection.

23 Q When you go to the Bureau of Labor Statistics, are you  
24 looking for the mean hourly age of skilled nursing?

25 A No, no, of a house -- a houseworker or someone who -- a

SAM

OCR

RMR

CRR

RPR

Cummings - cross - Barmen

1262

1 cleaning person.

2 Q Domestics as opposed to skilled nursing?

3 A Oh, yeah. Yeah, he doesn't need that.

4 Q Any reason to include the cost of nursing care for this  
5 man, assuming everything he says is true?

6 A No.

7 Q Other than the fact he had a cane with him and told you  
8 he needed one, any other reason to include that in the plan,  
9 your plan?

10 A Well, again, it was throughout the records that he was  
11 walking with a cane.

12 Q Did Mr. Bauta tell you that he can't cook for himself?

13 A No.

14 Q Did he tell you he can do his own laundry?

15 A Yes.

16 Q Did he tell you he can clean his own house or apartment?

17 A He has -- at the time that I saw him, he had a single  
18 room, and, yes, he said that he was able to do those things,  
19 but it took a long time.

20 Q Okay. And despite the fact that he could do it, because  
21 it took him longer, you thought it appropriate to include  
22 10 hours a week of home care in his plan?

23 A Yes.

24 Q Okay. Have you since come -- well, strike that. We'll  
25 come back to that.

SAM

OCR

RMR

CRR

RPR

Cummings - cross - Barmen

1263

1 Let's talk about the PT and psychotherapy.

2 MR. BARMEN: Can you pull up P-457-0017, please?

3 Small screens?

4 (Pause.)

5 MR. BARMEN: That was my fault, I said the wrong  
6 number. 0017, please. Okay, thank you.

7 BY MR. BARMEN:

8 Q You explained to Mr. McElfish how you came up with 50 PT  
9 sessions and 50 psychotherapy sessions. So I don't want to go  
10 over that, I want to go a different direction.

11 You saw Mr. Bauta in 2016, fair?

12 A Yes.

13 Q You prepared your plan in the fall of 2016?

14 A Yes.

15 Q And you haven't seen any additional records since, is  
16 that fair?

17 A Yes.

18 Q If Mr. Bauta has not been actively doing PT for the last  
19 year, would you still include that in your plan?

20 MR. McELFISH: Objection, incomplete hypothetical.

21 THE COURT: Overruled.

22 You can answer.

23 A I would -- I would not.

24 Q Okay. And why is that?

25 A Because his not receiving physical therapy over the

Cummings - cross - Barmen

1264

1 past -- I don't know how long you said -- but over, you know,  
2 a number of months or a year would suggest or indicate that he  
3 doesn't need to treatment.

4 Q The records you reviewed when he was doing physical  
5 therapy, was he compliant?

6 A He seemed to be compliant with physical therapy.

7 Q The psychotherapy, same question: If he hasn't been  
8 treating with a psychotherapist in well over a year, would you  
9 take that off the list?

10 A Yes, I would remove it from my lifecare plan.

11 Q Okay. Based upon your experience and training in  
12 lifecare planning and your background as a psychologist, is  
13 cognitive therapy the same thing as psychotherapy?

14 A No, it's not.

15 Q Mr. McElfish asked you about Dr. Thomas.

16 Do you know what kind of therapy Dr. Thomas has been  
17 providing to Mr. Bauta?

18 A My understanding is that he has been providing some  
19 supportive psychotherapy and cognitive therapy.

20 Q And do you know the breakdown between the two?

21 A I don't.

22 MR. BARMEN: Okay. Can you roll February 4th for  
23 me?

24 BY MR. BARMEN:

25 Q I want you to -- we are going to play some video, I want

Cummings - cross - Barmen

1265

1 you to watch it for me.

2 MR. McELFISH: Objection, foundation, outside the  
3 scope, relevance to this witness.

4 MR. BARMEN: I am happy to lay some additional  
5 foundation, Your Honor.

6 THE COURT: Sure. Go ahead.

7 BY MR. BARMEN:

8 Q Have you recently come to be aware of a potential change  
9 in circumstances relative to Mr. Bauta?

10 A Yes.

11 Q And what is that?

12 MR. McELFISH: Objection, vague and ambiguous on  
13 this point.

14 THE COURT: Overruled.

15 You can answer.

16 A Well, I saw a video footage that showed him doing things  
17 that I would never have expected him to do based on my  
18 evaluation of him and based on the medical records.

19 MR. McELFISH: Objection, move to strike,  
20 foundation, and it's beyond her deposition. It wasn't asked,  
21 shown; it wasn't in existence.

22 THE COURT: When did you become aware of this video?

23 THE WITNESS: Over the weekend.

24 THE COURT: Okay.

25 MR. McELFISH: Move to strike, curative instruction.

Cummings - cross - Barmen

1266

1 MR. BARMEN: Your Honor, the video didn't exist when  
2 she was deposed.

3 THE COURT: I am going to sustain the objection.  
4 This testimony is stricken, ladies and gentlemen.  
5 Ignore it.

6 MR. McELFISH: Thank you.

7 BY MR. BARMEN:

8 Q As an expert, hypothetically, if he is much more capable  
9 than he told you, would that affect the items in your plan?

10 MR. McELFISH: Vague and ambiguous as to time.

11 THE COURT: Overruled.

12 A Yes, if he -- if he's more capable than I understood from  
13 what he told me back in 2016, I would remove certain things  
14 from the lifecare plan that are no longer necessary.

15 Q Okay. So if he wasn't bedridden the way he told you for  
16 hours a day, would you take the home care out of your plan?

17 THE COURT: Sustained.

18 MR. McELFISH: Thank you.

19 BY MR. BARMEN:

20 Q If he was able to function substantially better than he  
21 let on, would he still need home care?

22 MR. McELFISH: Same objection.

23 THE COURT: Overruled.

24 A I don't think he would.

25 Q Okay. And of the total \$432,000 in your plan, almost

Cummings - cross - Barmen

1267

1 300,000 of that is accounted for by home care, correct?

2 A Yes.

3 Q If he's not using and never used a shower chair, does he  
4 need one?

5 A No, that would indicate that he has no need for one.

6 Q Okay. The same thing with a back brush or grab bars, if  
7 he's never been using it, does he need it?

8 A No.

9 Q If he's not been seeing a spine specialist, would you  
10 take that off the list?

11 A I would.

12 Q And, again, you wouldn't know any of these things because  
13 you haven't seen records since 2016, fair.

14 A Yes.

15 Q Based on your education, training and experience, is  
16 using these types of programs you mentioned for CPT codes the  
17 appropriate way to price out these costs?

18 A Are we talking about the Physicians Fee Reference?

19 Q Yes, ma'am.

20 A Yes, that's an acceptable way of pricing out items in  
21 lifecare plans.

22 Q I think you mentioned, tell me if I'm wrong, that you  
23 used to follow the method that Mr. Provder told the jury  
24 about, making three to five phone calls to various providers?

25 A I used to do that.

Cummings - cross - Barmen

1268

1 Q When did you stop doing that?

2 A I would estimate around 2000-2001.

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4 (Continued on the following page.)

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Cummings - cross - Barmen

1269

1 CROSS EXAMINATION

2 BY MR. BARMEN: (Continuing)

3 Q So 17, 18 years ago. Why did you stop doing it that way?

4 A Well, as I was describing earlier, it was just an  
5 inefficient way to go about getting the cost for medical  
6 treatment services because it wasn't a code-based endeavor.  
7 So a lot of times I would get answers that were different from  
8 one person on the phone, send me to another and give me a  
9 different answer, often I was asked what are the codes and  
10 without them, they wouldn't speak to me in some instances.

11 Q So is it fair to say that the method that you use is much  
12 more effective and efficient? Fair?

13 A Yes.

14 MR. BARMEN: Okay. One moment.

15 Q Ms. Cummings, in doing your life care plan review of the  
16 records, you don't form any opinions as to how his alleged  
17 injuries were caused, do you?

18 A No, I don't.

19 Q And you wouldn't have, likewise, any opinions on whether  
20 things were preexisting, whether they be physical or emotional?

21 A No.

22 MR. BARMEN: Your Honor, before I finish with this  
23 witness, can we approach briefly?

24 THE COURT: Sure.

25 (Sidebar held outside the hearing of the jury.)

Sidebar

1270

1 (The following sidebar held outside of the hearing  
2 of the jury.)

3 MR. BARMEN: MR. BARMEN: I understood your  
4 objection relative to the questions when I was going to play  
5 the video but I want to renew that request for the simple  
6 purpose of I'm not going to ask her any opinions, whether she  
7 would back anything out, I just want to play it and ask her if  
8 that is representative of the guy that presented to her for  
9 her evaluation. I think it's relevant to her opinions.

10 THE COURT: When was her meeting with him?

11 MR. BARMEN: Fall of 2016.

12 MR. McELFISH: No, that's not correct. Her meeting  
13 with him was in January of 2017.

14 MR. BARMEN: Her report was 2016.

15 MR. McELFISH: So her meeting was January of 2017.

16 MR. BARMEN: 2016. The meeting had to be before the  
17 report.

18 MR. McELFISH: I'm sorry. The meeting was before  
19 the report. You're correct.

20 MR. BARMEN: So it was all in 2016.

21 THE COURT: And so the video is from February of  
22 2017?

23 MR. BARMEN: Correct.

24 MR. KIEFFER: Is it the same video that we played  
25 earlier today or is it a different video?

Sidebar

1271

1 MR. BARMEN: The same. Well, not the one -- the one  
2 he's walking down the street without the cane.

3 MR. KIEFFER: Because there's no foundation.

4 MR. BARMEN: The one without the cane, the one that  
5 he was walking down the street.

6 MR. McELFISH: There's no foundation unless the  
7 investigators come.

8 MR. BARMEN: You put them all in evidence already.  
9 You did, not me. They're already in evidence, Your Honor.

10 MR. McELFISH: Judge, it's totally inappropriate.  
11 She's being asked to have an opinion about what she sees on  
12 the videotape.

13 MR. BARMEN: No, no. I simply -- I'm sorry. Go  
14 ahead.

15 MR. McELFISH: They're trying to use it as a way to  
16 get somebody to say something about the videotape. That's  
17 all.

18 MR. BARMEN: Well, the investigators are going to  
19 come in and they're going to say plenty about the videotape,  
20 so it's not like it's not going to be seen.

21 MR. McELFISH: I have no problem with that.

22 MR. BARMEN: I'm not done. Please.

23 MR. McELFISH: That's not the right witness for  
24 that.

25 MR. BARMEN: Mr. Kieffer moved the entire video into

Sidebar

1272

1 evidence with -- and that includes parts -- first off, what  
2 they're talking about hasn't been seen, displayed in open.  
3 The entire video is now in evidence because they moved it in.  
4 It's certainly relevant if she sees and can say what's  
5 depicted there is not the same person in terms of the  
6 complaints presented to me, or even if he has now progressed  
7 to that part, it would certainly impact what he needs going  
8 forward in my opinion as a life-care planner.

9 MR. McELFISH: Let me tell you why this is  
10 objectionable. Of course the video is in evidence. We moved  
11 it in. That's not the issue. The issue is that it's a  
12 totally different setting. She sees him in his office sitting  
13 down. She's able to talk with him and interact with him.  
14 This is not the same time period. It's a totally different  
15 time period, totally different environment. It lacks  
16 foundation. And how is she -- what is she supposed to say?  
17 Oh, I see him walking up and down now. That is totally  
18 inappropriate.

19 MR. MANNION: That should go to weight.

20 MR. McELFISH: It is an undisclosed opinion on top  
21 of everything else.

22 MR. MANNION: We don't have to ask what was backed  
23 out or what she would back out. The mere fact that this isn't  
24 the same gentleman who presented to her goes to the  
25 credibility.

Sidebar

1273

1 MR. McELFISH: You should have supplemented.

2 Judge, this video has been in existence for a long  
3 time. I would have taken her deposition on this.

4 MR. MANNION: We didn't call her. We weren't  
5 calling her.

6 MR. McELFISH: We showed it to you this weekend.  
7 I'm sorry. That doesn't help you. If she's an expert in the  
8 case and she has a supplemental opinion, you have to disclose  
9 it, so I have a right to either move to strike it or --

10 MR. MANNION: It's --

11 MR. McELFISH: Can I finish?

12 THE COURT: I'm not going to allow it. Make your  
13 arguments with the jury. If you want to ask her -- no, I'm  
14 just not going to allow it.

15 (Sidebar concluded.)

16 (Continued on the following page.)

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Cummings - redirect - McElfish

1274

1 MR. McELFISH: I don't know if he is done.

2 MR. BARMEN: I don't have any other questions.

3 Thank you.

4 REDIRECT EXAMINATION

5 BY MR. McELFISH:

6 Q Ms. Cummings, I think the last question that Mr. Barmen  
7 asked you was whether or not you had any opinions as to  
8 causation in this accident. Do you remember that?

9 A Yes.

10 MR. McELFISH: Small screens, Judge. 432-36 for ID.

11 THE COURT: I got them up.

12 MR. McELFISH: Let me just find it for you. It is  
13 432-006 for identification, lines 19 through --

14 MR. BARMEN: What page is that, please?

15 MR. McELFISH: Page 35. I am going to bring it out  
16 for you there. 19 through 24. I blew it up, Judge. And  
17 there is no objection in the deposition.

18 THE COURT: I'm sustaining this. She is not a  
19 causation expert.

20 Q Ms. Cummings, you had mentioned in your cross-examination  
21 by Mr. Barmen that you put a lot of stock and a lot of faith  
22 in what the treating doctors say?

23 A Yes.

24 Q Okay. And you understand -- withdrawn. Do you  
25 understand whether or not Mr. Bauta is still currently

Cummings - redirect - McElfish

1275

1 treating and under follow-up care with Dr. Cordiale?

2 A I don't know.

3 Q All right. Mr. Barmen asked you on cross if he had not  
4 seen a spine surgeon you'd take that out of your life care  
5 plan. So you don't know whether or not he just saw Dr.  
6 Cordiale a couple weeks ago; correct?

7 MR. BARMEN: Objection.

8 THE COURT: Overruled.

9 A As I said, I don't know that he -- whether or not he's  
10 been seeing Dr. Cordiale.

11 Q Let me pose it as a hypothetical. I'm sorry. I thought  
12 you were done. Let me pose that as a hypothetical. If you  
13 assume that Dr. Cordiale testified to this jury that Mr. Bauta  
14 is still under his care, he has not been discharged and saw  
15 him recently and intends to see him again, you would not take  
16 it out of the life care plan; correct?

17 A I would have to know what he means by intends to see him  
18 again. I mean, is it I'll see you as needed, I'll see you  
19 back in six months, a year. It's not enough information.

20 Q Assume as needed.

21 A Assume as needed, then I would, at the very least, reduce  
22 the amount that I have in my plan, the amount of visits.

23 Q Okay. But you don't know because you weren't provided  
24 that information?

25 MR. BARMEN: Objection.

Cummings - redirect - McElfish

1276

1 THE COURT: Overruled.

2 You can answer.

3 A I wasn't provided with that information.

4 Q You were asked questions about the 110 West 34th Street  
5 location. You don't know anything else about that location  
6 other than that some of the early doctors Mr. Bauta treated  
7 with practice there?

8 A No. I don't know anything else about it, but I just  
9 noticed that they were all from that location.

10 Q Well, that's what I wanted to talk to you about and clear  
11 up. When you say they all were at that location, you're  
12 talking about a couple of doctors who worked there, a couple  
13 of the early doctors, and I will give you some examples, Dr.  
14 Vasile, Dr. Winn, Dr. Capiola, a couple of doctors come in  
15 there and use that office space, but have offices in other  
16 locations, you understand that; right?

17 MR. BARMEN: Objection.

18 THE COURT: Overruled.

19 A I don't know what the configuration of that address is  
20 and the practices.

21 Q So you don't specifically know, for instance, how often  
22 or how long any one of Mr. Bauta's doctors, if they go to that  
23 location, how long they actually practice there, or how many  
24 days they practice there, those types of details?

25 A No. I was just struck by the fact that all these

Cummings - redirect - McElfish

1277

1 different specialists were in that same building or complex  
2 because usually it's, you know, similar doctors are in the  
3 same office or the same building rather than kind of the whole  
4 spectrum.

5 Q Well, have you ever heard of a multi-disciplinary  
6 practice where doctors have different kinds of doctors in  
7 their practice?

8 A Not by that term specifically, no.

9 Q Never heard of that?

10 A No.

11 Q Okay. All right. And you understand those were some  
12 doctors that Mr. Bauta treated with early in his treatment and  
13 care, but not long after that he went out to see the New York  
14 Spine Group? You're aware of that; right?

15 A Yes.

16 Q You read those records?

17 A Yes.

18 Q He treated with Dr. Mikelis, Dr. Cordiale, and he treated  
19 with others out there; true?

20 A I understand that he treated with Dr. Cordiale and that  
21 Dr. Lattuga provided some reports but didn't actually see him.

22 MR. McELFISH: Objection. Move to strike.

23 THE COURT: Overruled.

24 Q You understand that the treating surgeon in this case, as  
25 well as Dr. Mikelis treated Mr. Bauta at the location on -- in

Cummings - redirect - McElfish

1278

1 Lake Success, Long Island. Do you understand that, first of  
2 all?

3 MR. BARMEN: Objection.

4 THE COURT: Overruled.

5 A Lake Success, Long Island? I mean, I'm not aware of the  
6 address. I understand that those doctors practice together.

7 Q Do you know where New York Spine is based, the practice?

8 A No.

9 Q If I told you it's out on Long Island, Lake Success, does  
10 that ring a bell?

11 A No.

12 Q They are certainly not associated with 110 West 34th  
13 Street, are they?

14 MR. BARMEN: Objection.

15 THE COURT: Overruled.

16 Q Based on your view of the records?

17 A No.

18 Q He has treated there now for over two and a half years,  
19 including the surgery; correct?

20 A I can't say because I don't have updated records.

21 Q Well, the records that you have, he began treating there  
22 in late 2014, just a year -- about a year after the accident,  
23 up until at least recently, when the records that you have  
24 come to an end, right? In '17?

25 A I don't have records from 2017. The last record that I

Cummings - redirect - McElfish

1279

1 have is from mid 2016 or early 2016.

2 Q And that has nothing to do with 110 West 34th Street;  
3 right?

4 A I don't understand the question.

5 Q The treatment with Dr. Cordiale in Lake Success and New  
6 York Spine has nothing to do with 110 West 34th Street?

7 A It's certainly not in the same location.

8 Q Ms. Cummings, do you know if they have anything to do  
9 with each other?

10 A I don't know.

11 Q And you know he had surgery at North Shore Hospital or  
12 Franklin Hospital out on Long Island, that certainly has  
13 nothing to do with West 34th Street; correct?

14 A It doesn't seem as if it would.

15 Q But you don't know, do you?

16 A I don't.

17 Q Now, Mr. Barmen was asking you questions about the  
18 difference between cognitive therapy and psychotherapy. Do  
19 you remember those questions?

20 A Yes.

21 Q And your answer was Dr. Thomas, according to the records  
22 that you reviewed, in your understanding was giving him a  
23 combination of both?

24 A Yes.

25 Q So based on the fact that at least part of Dr. Thomas'

Cummings - redirect - McElfish

1280

1 treatment is psychotherapy, you would leave it in the plan?

2 Yes?

3 A Let me think about that for a sec. The way that is  
4 worded, I can't quite grasp it.

5 Q Let me make it simpler. If he is treating and getting  
6 some psychotherapy, you would leave it in the plan?

7 A If he was continuing to treat at this state?

8 Q Yes.

9 A Yes, I would.

10 Q Now, Dr. Thomas, he's a treating doctor. You know he has  
11 been deposed three times. He's not an expert witness. Did  
12 you review his depositions?

13 A Were we just talking about Dr. Thomas right before that?

14 Q Yes.

15 A No, I have not read his deposition testimony.

16 Q So you are putting a life care plan together. You told  
17 the jury that you put all the stock in the treating doctors  
18 and you haven't read the deposition or one of three  
19 depositions or any of three of the main treating doctors for  
20 his emotional problems?

21 MR. BARMEN: Objection.

22 THE COURT: Sustained.

23 MR. McELFISH: Let me rephrase, please.

24 Q You put stock in treating doctors, but you haven't read  
25 Dr. Thomas' depositions?

Cummings - redirect - McElfish

1281

1 MR. BARMEN: Objection.

2 THE COURT: Sustained.

3 Give me one minute, please.

4 MR. McELFISH: Sorry. I didn't hear what you said.

5 THE COURT: Give me one minute, please.

6 Can you direct me to Dr. Thomas' first deposition,  
7 please?

8 MR. BARMEN: It is February 2, 2017. That's the  
9 first one, February 2, 2017.

10 THE COURT: I will sustain the objection.

11 Q When you were doing your report back in October of 2016,  
12 did you have available to you, at least up until that point in  
13 time, all of Dr. Thomas' treating records?

14 A I believe I did. I know I had his records. I can't  
15 speak to the completeness of them.

16 Q Okay. Do you give him more weight in your evaluation  
17 than you do Dr. Morgan because you believe treating doctors  
18 more than you believe experts?

19 MR. BARMEN: Objection.

20 THE COURT: Overruled.

21 A I gave more weight to Dr. Thomas -- Dr. Thomas' records,  
22 because he was a treating physician, yes. Not a physician,  
23 but psychologist.

24 Q More weight than Dr. Morgan; right?

25 A Yes. Because if I rely on Dr. Morgan, as with Casden and

Cummings - redirect - McElfish

1282

1 Rabin, there wouldn't be much for me to have in the life care  
2 plan.

3 Q Okay. And so, with respect to a choice, for instance,  
4 between Dr. Cordiale and Dr. Casden, you gave Dr. Cordiale and  
5 the other treating doctors more weight than the defense  
6 medical expert Dr. Casden?

7 MR. BARMEN: Objection.

8 THE COURT: Sustained.

9 Q Now, you mentioned that -- in some hypothetical Mr.  
10 Barmen asked you about, I want you to assume Mr. Bauta doesn't  
11 use shower chairs and grab bars, Mr. Bauta didn't tell you  
12 that he had a shower chair or a grab bar back when you met  
13 with him, did he?

14 A No, he did not.

15 Q Okay. So if he didn't use one then and he didn't use one  
16 now, it should stay in the plan because he didn't use one  
17 then?

18 A It should be out of the plan if he doesn't use one then  
19 and he doesn't use one now.

20 Q But you put it in your report, and when you met with him  
21 you knew at that point in time, you spent an hour with him,  
22 that he didn't use one then?

23 A I knew that he didn't have one.

24 Q So he still doesn't have one, therefore, he doesn't use  
25 one; correct?

Cummings - redirect - McElfish

1283

1 A Not at that time. I was basing it on his complaints of  
2 pain and stiffness in his back and if -- the fact that he  
3 didn't have them at that time didn't mean that he didn't need  
4 them; however, if he has not used them from then until now,  
5 it's clear to me that he doesn't need them.

6 Q But, Ms. Cummings, you have nothing to base that on  
7 because you haven't seen him again and you haven't spoken to  
8 him again and you haven't gotten a chance to talk to him  
9 again; isn't that true?

10 MR. BARMEN: Objection.

11 THE COURT: Sustained.

12 MR. McELFISH: Let me break it down.

13 Q When you came to the opinion that he needed one, you had  
14 a chance to sit down and see him and talk to him; right?

15 A Yes.

16 Q You have not done that since?

17 A Correct.

18 Q So you don't know whether or not he still needs one? You  
19 haven't spoken to him about how he feels; true?

20 A I haven't had the opportunity to speak with him other  
21 than in earlier January of 2016 and I'm saying if he hasn't  
22 used them, then I would take them out of the life care plan.

23 Q So I just want to understand how it works. If somebody  
24 tells you in 2016 that -- withdrawn.

25 If you determine in 2016 somebody needs one, right,

Cummings - redirect - McElfish

1284

1 and then a year later, and you don't know any other  
2 information, if they haven't used it in a year, you don't give  
3 it to them in your life care plan?

4 MR. BARMEN: Objection.

5 THE COURT: Overruled.

6 A I think you might have misunderstood what I said. What I  
7 said was if I learned that he hasn't used them, I would take  
8 them out. I wouldn't take them out right now because I don't  
9 have information to base such a decision on.

10 (Continued on next page.)

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Cummings - recross - Barman

1285

1 BY MR. McELFISH: (Continuing.)

2 Q You know what, you're right, I did misunderstand but you  
3 haven't learned that he doesn't use one other than a  
4 hypothetical question from Mr. Barman?

5 A I have not.

6 Q You mentioned the word complaint with respect to the  
7 treatment and the physical therapy and it was your opinion  
8 elicited by Mr. Barman that Mr. Bauta was complying with his  
9 physical therapy; isn't that right?

10 A Yes.

11 Q And what does compliant mean?

12 A It means that he attends the sessions as recommended by  
13 the physical therapist.

14 Q Again, Ms. Cummings, thank you. I appreciate your time.

15 RECROSS-EXAMINATION

16 BY MR. BARMEN:

17 Q Quickly, Ms. Cummings, I just want to clarify. You  
18 mentioned that if you relied on the defense expert there would  
19 be nothing in your report. What did you mean by that?

20 A I mean that the defense experts basically said that he  
21 has no future needs, that he has no permanent jury and that  
22 would give me a reason to put nothing in the life care plan if  
23 I relied strictly on those reports.

24 Q And that includes both the defense experts relative to  
25 the physical complaints as well as the emotional and

Cummings - redirect - McElfish

1286

1 neurological complaints?

2 A Yes.

3 Q And is that why you relied primarily on the treaters and  
4 the subjective complaints of the subject himself?

5 A Yes.

6 Q And is the converse true that if you relied too heavily  
7 on the plaintiff experts, you would have an artificially  
8 inflated plan?

9 A Yes.

10 Q Potentially a plan \$3 million more than your worse-case  
11 scenario plan?

12 MR. McELFISH: Objection argumentative.

13 THE COURT: Overruled.

14 A Yes.

15 Q You've reviewed Mr. Provder's report?

16 A I have.

17 Q And he's \$3 million above what your worst-case scenario  
18 calls for?

19 MR. McELFISH: Objection, argumentative.

20 THE COURT: Overruled.

21 A Correct.

22 MR. BARMEN: Okay, thank you.

23 REDIRECT EXAMINATION

24 BY MR. McELFISH:

25 Q Ms. Cummings, I thought I just heard you testify that if

Cummings - redirect - McElfish

1287

1 you relied upon Dr. Morgan's report, you wouldn't be giving  
2 any psychotherapy?

3 MR. BARMEN: Objection.

4 Q Is that what I heard?

5 THE COURT: Sustained.

6 Q Let me read from your deposition, ma'am.

7 MR. BARMEN: Objection.

8 THE COURT: Sustained.

9 MR. McELFISH: Judge, this is important. Sidebar,  
10 please, if you're not going to let me. Let me pull up the  
11 transcript and you can take a look. Let me get to -- if you  
12 would, Judge, go to 432-0024 for ID beginning at line nine  
13 going down to line 23.

14 MR. BARMEN: Objection.

15 MR. McELFISH: It's impeaching.

16 MR. BARMEN: It's improper.

17 THE COURT: I'll allow it.

18 Q In your deposition, Ms. Cummings, you were asked the  
19 following questions and you gave the following answers on page  
20 23 of the deposition, page 24 is the exhibit, line nine  
21 through 23:

22 "Question: The guy either misspoke or I misheard,  
23 probably the former. Dr. Morgan is what I meant to say also  
24 had the opinion that basically Mr. Bauta was making up his  
25 complaints and did not need future care.

Cummings - redirect - McElfish

1288

1 "Did you -- so what I'm trying to understand the  
2 foundation for the question is what defense doctor did you  
3 rely upon in coming to the conclusion that he did need care?"

4 Then there's an objection by Mr. Barmen, go ahead,  
5 and then the witness answers, I apologize. The answer is:

6 "Dr. Morgan's report doesn't say he doesn't need  
7 care. It says he has no permanent injury, but it says he  
8 shows signs of distress which can be ameliorated by  
9 psychotherapy."

10 Is that the questions that you were asked and the  
11 answers you gave in your deposition under oath?

12 A You are right. I remembered that it was Dr. Morgan who  
13 said that he had objective signs -- he showed signs of stress  
14 which could be ameliorated by psychotherapy.

15 Q Okay. So if you're relying on Dr. Morgan's report, you  
16 would still give care; correct?

17 A What kind of care?

18 Q Psychotherapy.

19 A I did.

20 Q Great. That's it. I have no further questions.

21 MR. BARMEN: Nothing, Your Honor.

22 THE COURT: Thank you, Ms. Cummings. You are  
23 excused.

24 (Witness excused.)

25 THE COURT: Call your next witness.

Cummings - redirect - McElfish

1289

1 MR. KIEFFER: Chris Viggiano.

2 MR. BARMEN: Your Honor, these folks have informed  
3 us that they need to be on a train by 5:30. They've been here  
4 all day.

5 THE COURT: Are they coming back tomorrow?

6 MR. BARMEN: Please confirm that.

7 MR. McELFISH: I can't do tomorrow. I have  
8 Dr. Mobin tomorrow.

9 MR. BARMEN: These witnesses should go quickly.

10 THE COURT: Either they take a later train or they  
11 come another day.

12 MR. McELFISH: Is there any one of the three  
13 witnesses.

14 (Pause in proceedings.)

15 THE COURT: Raise your right hand.

16 (Witness sworn/affirmed.)

17 THE COURT: Can you have a seat please and tell the  
18 court reporter your name and please spell it also.

19 THE WITNESS: Christine Gauthier C-H-R-I-S-T-I-N-E  
20 G-A-U-T-H-I-E-R.

21 THE COURT: You may inquire.

22 **CHRISTINE GAUTHIER,**

23 called by the Plaintiff, having been

24 first duly sworn, was examined and testified

25 as follows:

Gauthier - direct - Kieffer

1290

1 DIRECT EXAMINATION

2 BY MR. KIEFFER:

3 Q Good afternoon, ma'am.

4 A Good afternoon.

5 Q Who do you work for?

6 A Beau Dietl & Associates.

7 Q What do you do?

8 A Investigator.

9 Q How long have you been an investigator?

10 A 15 years.

11 Q You are not a licensed private investigator?

12 A No I'm not.

13 Q Did you do work on the Jose Bauta case?

14 A Yes.

15 Q What sort of work did you do?

16 A I did surveillance.

17 Q When did you do surveillance?

18 A I don't have a copy of my report. Could you supply a  
19 copy?

20 Q No, ma'am. Your attorneys refused to give us a copy of  
21 your report.

22 THE COURT: Sustained, stricken.

23 Q Do you recall giving a deposition in this case, ma'am?

24 A Correct.

25 Q And you had a copy of your report at your deposition,

Gauthier - direct - Kieffer

1291

1 true?

2 A Yes.

3 Q All right. And you were able to provide us at the time  
4 of your deposition with the dates of your surveillance, were  
5 you not?

6 A Yes.

7 Q Have you reviewed that deposition recently in preparation  
8 for your testimony here today?

9 A Yes.

10 Q So you recall that the first date you did surveillance on  
11 Mr. Bauta was January 14, 2017; correct?

12 A No. It was 2016.

13 Q In 2016?

14 A Correct.

15 Q What month?

16 A I believe it's July.

17 Q All right. And what did you do on that date?

18 A I went to the subject's home address and documented  
19 anything that I saw, which I did not see him.

20 Q How long were you there?

21 A Eight hours.

22 Q Okay. You didn't see Mr. Bauta?

23 A No.

24 Q Okay. Did you take any video?

25 A Yes.

Gauthier - direct - Kieffer

1292

1 Q What video did you take?

2 A Just hourly time shots.

3 Q Okay. You next did surveillance on Mr. Bauta on February  
4 18th of 2017?

5 A No, another day in 2016.

6 Q What day?

7 A I'm not sure.

8 Q What did you do?

9 A Went to his home address.

10 Q And what did you do at his home address?

11 A Just document anything I saw, which I did not see him.

12 Q Another eight-hour shift?

13 A Yes.

14 Q Were you alone or with somebody?

15 A Alone.

16 Q Okay. Mr. Bauta didn't come or go from that residence  
17 during that day?

18 A Correct.

19 Q Okay. So you just took hourly time shots?

20 A Correct.

21 Q Okay. Did you go do surveillance on Mr. Bauta after that  
22 date?

23 A Yes.

24 Q When?

25 A In 2017.

Gauthier - direct - Kieffer

1293

1 Q February of 2017?

2 A I believe so.

3 Q Okay. February 18th?

4 A I believe so.

5 Q What did you do on February 18th?

6 A We went to a provider doctor's address.

7 Q And what was that address?

8 A I'm not -- I don't remember it.

9 Q Do you know who the doctor was?

10 A I don't remember. I would need my report.

11 Q All right. Well, I don't have your report, ma'am.

12 MR. BARMEN: Objection, Your Honor.

13 THE COURT: Sustained, stricken.

14 Q Did you see Mr. Bauta on that date?

15 A No, I don't.

16 Q Okay another eight-hour shift?

17 A Yes.

18 Q Did you work alone or was there another investigator with  
19 you?

20 A Another investigator was with me.

21 Q Who?

22 A I believe Scott Whitlock.

23 Q And did you do surveillance on Mr. Bauta in January of  
24 2017?

25 A I'm not sure of the dates.

Gauthier - direct - Kieffer

1294

1 Q Okay. When is the last time you did any surveillance on  
2 Mr. Bauta?

3 A I'm not sure. I know I did four days but I would need --

4 Q You're not sure of the four days, but you did review your  
5 sworn deposition testimony in preparation for today?

6 A Yes, but I wasn't allowed to bring my report so I didn't  
7 bring it.

8 Q You were specifically told not to bring your report?

9 MR. BARMEN: Objection.

10 A No, not at all.

11 Q Who didn't allow you not to bring it?

12 MR. BARMEN: Objection.

13 THE COURT: Overruled.

14 A We were just told that you would have the reports, that  
15 we would be able to look at them.

16 Q All right. And you were told you didn't need to bring  
17 your own reports?

18 A Correct.

19 Q And your reports would set forth the details of what you  
20 did, when you did it, where you did it and for how long you  
21 did it; correct?

22 A Correct.

23 Q All right.

24 THE COURT: Would they be materially different than  
25 what you testified to already today?

Gauthier - direct - Kieffer

1295

1 THE WITNESS: No.

2 THE COURT: Each time was an eight-hour shift either  
3 at his home or a doctor's office?

4 THE WITNESS: Correct.

5 THE COURT: And if you saw something you would have  
6 shot video on it?

7 THE WITNESS: Correct.

8 THE COURT: You did not see anything?

9 THE WITNESS: No.

10 THE COURT: And you took hourly time shots?

11 THE WITNESS: Correct.

12 THE COURT: Anything else?

13 THE WITNESS: That's it.

14 Q Four occasions total, ma'am?

15 A Correct.

16 MR. KIEFFER: Thank you.

17 MR. BARMEN: Your Honor, I have no questions, but  
18 I'd like a cure instruction relative to the implications  
19 regarding the report. They issued a --

20 THE COURT: Nope.

21 You're excused. Thank you very much.

22 (Witness excused.)

23 THE COURT: Ladies and gentlemen, once again keep an  
24 open mind, no research, don't talk to anyone about it and if  
25 you see anyone in the halls just smile and pass them by.

Gauthier - direct - Kieffer

1296

1 Tomorrow morning 9 o'clock I will see you.

2 (Jury exits.)

3 (In open court.)

4 THE COURT: You will be here at 9. If you have  
5 issues you want to raise, fine, we'll talk about them. If  
6 not, we'll probably get going, knowing a couple of jurors  
7 straggle in about 9:30. We've got Dr. Mobin and he is going  
8 to be all day?

9 MR. McELFISH: He could be all day. Maybe we can  
10 get to the investigators tomorrow.

11 MR. BARMEN: Well, they did indicate they're  
12 available tomorrow. Thursday is bad for Sean, but tomorrow  
13 and Friday will work. Thursday doesn't work for Sean.

14 THE COURT: Well, let's actually do it this way. So  
15 Thursday doesn't work for Sean. What about Dr. Casden. How  
16 much time is he going to take?

17 MR. McELFISH: Probably similar to Cummings.

18 THE COURT: So not even half a day. So we can do  
19 them Wednesday, the investigators, and leave Mr. Bauta and  
20 Ms. Bauta for Thursday, if necessary.

21 MR. McELFISH: If necessary.

22 THE COURT: Well, he is necessary. So why don't we  
23 do them Wednesday and have the Bautas here just in case.

24 MR. McELFISH: Tomorrow we can also do the Lichy  
25 read-in.

Gauthier - direct - Kieffer

1297

1 THE COURT: I understand you have issues with that.

2 MR. McELFISH: We'll resolve it.

3 THE COURT: Resolve it by tomorrow morning and we  
4 will talk about it tomorrow morning if it's not resolved and  
5 then we will do the read in and then Dr. Mobin or vice versa.

6 MR. McELFISH: Vice versa just in case he goes long.  
7 When will we hear a ruling on the application to open on  
8 Brandon Osborn, the bus passenger?

9 THE COURT: Tomorrow morning.

10 MR. McELFISH: All right. Everybody have a good  
11 night.

12 (Matter adjourned until 9:00 a.m., Tuesday, May 8,  
13 2017.)

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I N D E XWITNESSPAGE**SCOTT WHITLOCK**

DIRECT EXAMINATION BY MR. KIEFFER 1068

CROSS-EXAMINATION BY MR. BARMEN 1101

REDIRECT EXAMINATION BY MR. KIEFFER 1111

**JAMES LAWRENCE THOMAS**

DIRECT EXAMINATION BY MR. KIEFFER 1115

CROSS-EXAMINATION BY MR. BARMEN 1134

REDIRECT EXAMINATION BY MR. KIEFFER 1188

**WENDY CUMMINGS**

DIRECT EXAMINATION BY MR. McELFISH 1193

CROSS-EXAMINATION BY MR. BARMEN 1254

REDIRECT EXAMINATION BY MR. McELFISH 1274

RECROSS-EXAMINATION BY MR. BARMEN 1285

REDIRECT EXAMINATION BY MR. McELFISH 1286

**CHRISTINE GAUTHIER**

DIRECT EXAMINATION BY MR. KIEFFER 1290

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E X H I B I T S

Plaintiff's Exhibit 302

1081

Plaintiff's Exhibit 364

1118

Plaintiff's Exhibit P-364-0102

1129

Plaintiff's Exhibit P-365

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